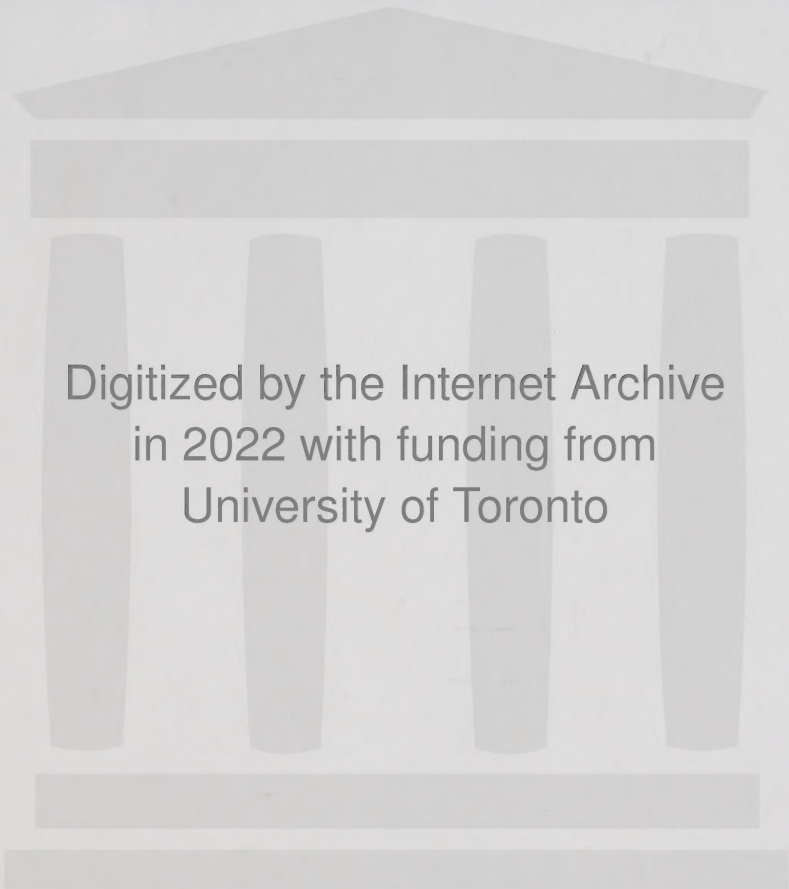

Disallowance and Reservation of Provincial Legislation

By

G. V. LA FOREST

of the Department of Justice

MARCH 1955

DEPARTMENT OF JUSTICE

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58722—1

CONTENTS

58722—1½

DISALLOWANCE AND RESERVATION OF PROVINCIAL LEGISLATION

Chapter 1

PRE-CONFEDERATION NEGOTIATIONS

The powers of disallowing and reserving provincial legislation were born of the spirit of compromise that permeated the deliberations of the Fathers of Confederation at the Conference held at Quebec during the month of October, 1864, for the purpose of devising a constitution to unite all the British provinces in North America. Before the Conference many of the Fathers had hoped for a legislative union of the provinces while others had favoured a federal constitution. In the end, however, they all agreed that a federation was the system of government best adapted to protect the diversified interests of the several provinces and the only one under which union was possible. But while they were thus satisfied that a federal union was the only basis on which the provinces would unite, the Fathers of Confederation were nonetheless well aware of the disadvantages of this system. These had come to light in the early years of the great republic to the South. In that country the general government had in the beginning been greatly embarrassed by the restricted powers given to it, and in many instances it was reduced to a condition of virtual impotence when a number of states chose to follow their own course upon some matters. This danger was obviated to a degree in the Canadian constitution by limiting the legislative sphere of the provincial legislatures to those local matters specifically named in the constitution while the residue of legislative power was assigned to the Central Parliament. But this was not all; in addition the makers of our constitution, in order to prevent the local legislatures from abusing their legislative rights, granted to the Central Government the power of annulling provincial legislation.

The question of vetoing provincial legislation was brought to the attention of the provincial representatives attending the Quebec Conference by the Honourable Oliver Mowat, one of the delegates from the Province of Canada, who, on October 25th, moved a resolution, part of which stated in effect that the power to veto provincial as well as federal legislation should continue as theretofore to be vested in the Imperial authorities (a). This motion was not fated to remain in this form, however, and following debate it was modified in such a way that the power to review provincial legislation was conferred upon the Federal Government. The motion as altered was unanimously adopted by the conference and the part that is relevant here reads as follows:

> 8. Any bill of the General Legislature may be reserved in the usual manner for Her Majesty's assent, and any bill of the Local Governments may in like manner be reserved for the consideration of the General Government.

(*a*) C. R. W. Biggar, *"Sir Oliver Mowat"*, Vol. 1, at pp. 132-3.

> 9. Any bill passed by the General Legislature shall be subject to disallowance by Her Majesty within two years, as in the case of bills passed by the said Provinces hitherto, and in like manner any bill passed by a Local Legislature shall be subject to disallowance by the General Government within one year after the passing thereof. (*b*)

This part of Mr. Mowat's motion became the 50th and 51st of the seventy-two resolutions finally adopted by the Quebec Conference. These two resolutions, by the complementary powers of disallowance and reservation, vest in the Governor General the power of reviewing provincial legislation in these terms:

> 50. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's Assent, and any Bill of the Local Legislatures may in like manner be reserved for the consideration of the Governor-General.
>
> 51. Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto, and in like manner any Bill passed by a Local Legislature shall be subject to disallowance by the Governor-General within one year after the passing thereof (*c*).

The Imperial authorities were quick to voice their approbation of the principle of strong central government for the proposed federation. In a despatch of December 3, 1864, acknowledging receipt of the Quebec Resolutions, the Secretary of State for the Colonies, the Right Honourable Edward Cardwell, wrote to Lord Monk, then Governor of Canada, that

> They (Her Majesty's Government) are glad to observe that, although large powers of Legislation are intended to be vested in local bodies, yet the principle of central control has been steadily kept in view. The importance of this principle cannot be over-rated. Its maintenance is essential to the practical efficiency of the system and to its harmonious operation, both in the General Government and in the Governments of the several Provinces (*d*).

In the early months of the following year, the Quebec Resolutions came up for debate in the Parliament of the Province of Canada. These debates constitute our chief source of knowledge as to what the Fathers of Confederation and other leading statesmen thought of the Federal Government's veto powers at the time of their inception. As might be expected of a discussion concerning provisions that had come into being as a result of a compromise arrived at by statesmen of widely differing views, the references in the debates to the twin powers of disallowance and reservation show no little contrariety of opinion both as to the wisdom of having such powers in the constitution and as to the manner in which they might properly be exercised. Most of the members drew no distinction between the power of disallowance and the power of reservation and referred simply to the veto power. Little attempt need be made here to distinguish between remarks respecting disallowance and those respecting reservation, for in general what is applicable to one is equally applicable to the other.

A number of the Fathers of Confederation and many others asserted the desirability of the Central Government's annulling powers over provincial legislation. John A. Macdonald, in moving in the Legislative

(*b*) Sir Joseph Pope, *"Confederation Documents"*, pp. 30-1.
(*c*) *Ibid*, pp. 48-9.
(*d*) Can. Sess. Pap., 1865, Vol. 24 (No. 12), p. 11.

Assembly that an address be presented to Her Majesty praying for the submission of a measure to the Imperial Parliament based on the Quebec Resolutions, made only a veiled reference to the veto powers, but in it he indicated that he considered the existence of such powers a necessary corollary to the system of government proposed. He said:

> As this is to be one united province, with the local governments and legislatures subordinate to the General Government and Legislature, it is obvious that the chief executive officer in each of the provinces must be subordinate as well. The General Government assumes towards the local governments precisely the same position as the Imperial Government holds with respect to each of the colonies now... (*e*)

Alexander Mackenzie also considered a veto power necessary and the Honourable John Sanborn described the Federal Government's right of disallowance as a "wise power" that "commended itself to all" (*f*). The powers found favour too with Sir E. P. Taché, Sir N. F. Belleau, G. E. Cartier, George Brown, Paul Denis, John Scoble, Hector Langevin and John Rose (*g*). The last named member, indeed, went so far as to assert that he would have voted against presenting the address had not a power of annulling provincial legislation been inserted in the Scheme. He said in part:

> Now, Sir, I believe this power of negative, this power of veto, this controlling power on the part of the Central Government is the best protection and safeguard of the system; and if it had not been provided, I would have felt it very difficult to reconcile it to my sense of duty to vote for the resolutions. But this power having been given to the Central Government, it is to my mind, in conjunction with the power of naming the local governors, the appointment and payment of the judiciary, one of the best features of the scheme, without which it would certainly, in my opinion, have been open to very serious objection (*h*).

Not all members, however, were satisfied that these rights of negative were wise ones. Thus one member, Philip Moore, feared that "The veto power..., if exercised frequently, would be almost certain to cause difficulty between the local and general governments" and would have preferred a qualified power somewhat like that existing in the United States (*i*). Christopher Dunkin considered that the power to disallow was unnecessary unless one assumed provincial powers would be abused, in which case a better remedy would have been to limit those powers (*j*). And the Honourable A. A. Dorion in expressing his disapproval of the power of disallowance pointed out one of its great dangers when he said:

> Now, sir, when I look into the provisions of this scheme, I find another most objectionable one. It is that which gives the General Government control over all the acts of the local legislatures. What difficulties may not arise under this system? Now, knowing that the General Government will be party in its character, may it not for party purposes reject laws passed by the local legislatures and demanded by a majority of the people of that locality... Do you not see that it is quite possible for a majority in a local government to be opposed to the General Government; and in such

(*e*) *Parliamentary Debates on the subject of Confederation of the British North American Provinces*, p. 42.

(*f*) *Ibid*, pp. 433 (Mackenzie) and 123 (Sanborn).

(*g*) *Ibid*, pp. 123, 228 (Taché), 183 (Belleau), 407-8 (Cartier), 108 (Brown), 876 (Denis), 911 (Scoble), 376-7 (Langevin) and 404-5 (Rose).

(*h*) *Ibid*, pp. 404-5.

(*i*) *Ibid*, pp. 228-9.

(*j*) *Ibid*, pp. 490, 502 and 514.

> case the minority would call upon the General Government to disallow the laws enacted by the majority? The men who shall compose the General Government will be dependent for their support upon their political friends in the local legislatures, and it may so happen that, in order to secure this support, or in order to serve their own purposes or that of their supporters, they will veto laws which the majority of a local legislature find necessary and good. We know how high party feeling runs sometimes upon local matters even of trivial importance, and we may find parties so hotly opposed to each other in the local legislatures, that the whole power of the minority may be brought to bear upon their friends who have a majority in the General Legislature, for the purpose of preventing the passage of some law objectionable to them but desired by the majority of their own section. What will be the result of such a state of things but bitterness of feeling, strong political acrimony and dangerous agitation? (*k*)

J. B. E. Dorion expressed similar views (*l*). The Honourable A. A. Dorion also gave voice to his apprehension that the Federal Government would be supreme, the local governments being "at its mercy, because it may exercise its right of veto on all the legislation of the local parliaments"—a situation that would, in his opinion, be the ruin of Lower Canada (*m*). This fear was shared by H. G. Joly who believed the power of reservation would be used to deny responsible government to Lower Canada (*n*). The majority of Lower Canadian statesmen, however, did not share this opinion, agreeing, no doubt, with Langevin's statement that "we should have our sixty-five members... who would unite... to turn out the ministry who should act in that manner" (*o*).

Varying opinions were expressed as to the occasions when the powers might properly be exercised. Some believed the Federal Government could thereby prevent injustice. Thus Brown:

> By vesting the appointment of the lieutenant governors in the General Government and giving a veto for all local measures, we have secured that no injustice shall be done without appeal in local legislation (*p*).

And these were the sentiments also of Taché, Belleau, Rose, Cartier and Denis (*q*). James Currie on the other hand felt that to disallow an Act for injustice "would be an interference with local rights" (*r*). And Sanborn, though not denying the propriety of disallowing for injustice, nevertheless warned that "it was... not an ordinary power... and... could not be frequently exercised without... occasioning evils of the greatest magnitude" (*s*).

Another ground for annulling local legislation—one that was in practice to prove the most important—was advanced by the Honourable Alexander Mackenzie who stated that

> The veto power is necessary in order that the General Government may have a control over the proceedings of the local legislatures to a certain extent. The want of this power was the great source of weakness in the United States, and it is a want that will be remedied by an amendment in

(*k*) *Ibid*, p. 258.
(*l*) *Ibid*, p. 860.
(*m*) *Ibid*, p. 690.
(*n*) *Ibid*, p. 361.
(*o*) *Ibid*, p. 376.
(*p*) *Ibid*, p. 108.
(*q*) *Ibid*, pp. 123 (Taché), 183 (Belleau), 407 (Rose), 407, 502 (Cartier) and 876 (Denis).
(*r*) *Ibid*, p. 123.
(*s*) *Ibid*, p. 123.

> their Constitution very soon. So long as each state considered itself sovereign, whose acts and laws could not be called in question, it was quite clear that the central authority was destitute of power to compel obedience to general laws. If each province were able to enact such laws as it pleased, everybody would be at the mercy of local legislatures, and the General Legislature would become of little importance (*t*).

So too, Scoble averred that the veto power would "prevent a conflict of laws and jurisdictions in all matters of importance", an opinion that was shared by Rose; and Taché clearly believed that it was proper to disallow a statute whenever it conflicted with the interests of the Federal Government (*u*).

Only Langevin seems to have dealt specifically with the conditions when a bill might properly be reserved; "reservation", he said, "will take place only in respect of such measures as are now reserved for Her Majesty's sanction" (*v*).

The Quebec Resolutions were not subjected to as detailed a discussion in the legislatures of the Maritime Provinces as they were in Canada and while the merits and demerits of strong central government were strenuously argued, few direct references to the powers of disallowance and reservation can be found in the reports (*w*). These powers came up for more specific criticism in New Brunswick than in the other Maritime Provinces. In that province the great fear that the Maritimes would be dominated by Canada can be seen from the remarks of the Premier, the Honourable A. J. Smith, in 1865. Speaking upon a resolution to send delegates to England for the purpose of making known the view of the House that the consummation of the Quebec Scheme would prove politically, commercially and financially injurious to the best interests and prosperity of the province, he said:

> By adopting this Scheme we surrender our independence, and become dependent upon Canada, for this Federal Government will have the veto power upon our legislation. The 51st section of the Scheme says: (The Premier then quoted the resolution). Here is a written Constitution with certain rights given and accorded to the local Legislatures, and certain rights are given to the General Government. Suppose there is a confliction between the two Governments, where is the appeal? In the United States they have an appeal to the Judges of the land; but here the General Government has an arbitrary veto and we have to submit. I think this is a very serious defect in the Constitution (*x*).

Another member, Mr. Otty, expressed the view that the 51st resolution was a "particularly objectionable" feature of the Quebec Scheme because "According to that, any law which we may pass, if it happen to conflict with the interest of Canada, can be disallowed..." (*y*).

The following year the pro-confederation party came into power in New Brunswick and a resolution was moved and passed that delegates be appointed to unite with delegates of the other provinces to arrange with the Imperial Government for the union of British North America.

(*t*) *Ibid*, p. 433.

(*u*) *Ibid*, pp. 911 (Scoble), 404 (Rose) and 123 (Taché).

(*v*) *Ibid*, p. 377.

(*w*) No reports of Newfoundland have been examined.

(*x*) Reports of the Debates of the House of Assembly of the Province of New Brunswick, 1865, p. 118.

(*y*) *Ibid*, p. 130.

In supporting this resolution, Sir S. L. Tilley replied to the objections advanced against the veto power in the same manner as Langevin had replied to similar arguments brought forward by those who feared that the rights of Lower Canada might be endangered. He said:

> Then he (Mr. Smith) says we have to send the Bills we pass here to a political body for their approval. Do we not send them to the British Government, and no difficulties occur. Can it be supposed that more difficulties will arise in getting the assent of the General Parliament to our Bills, when we have representatives there who will make and unmake Governments, than will arise in the Imperial Government where we have no direct voice in the matter (*z*).

During this debate the interesting suggestion was advanced by Smith and another member, C. W. Skinner, that the veto power might well be done away with by giving the courts power to adjudicate upon differences arising between the general and local governments (*aa*). The latter, who favoured union, had this to say:

> Then the General Government had a veto power over all the acts of the Provinces. If New Brunswick or Nova Scotia were to pass a law which they found to be required and it was afterwards declared unconstitutional by the General Government, it would cause a great deal of discontent. The whole might be obviated by placing the matter in the Judiciary, for the reverence of our people for the Bench is deep and constant... Yes, if the veto power were in the hands of the Judges, the people would bow to their decisions, but they would not if left with politicians.

As to reserved bills, little was said other than Smith's statement that this provision seemed unnecessary in view of the fact that the General Government had the power to disallow provincial laws (*bb*).

The legislature of Nova Scotia having passed a resolution similar to that adopted by the New Brunswick House of Assembly, delegations from three provinces, Canada, Nova Scotia and New Brunswick, set out for England in November, 1866, to frame the details of a bill incorporating the Quebec Resolutions and such changes as subsequent events had shown to be necessary. The delegates met at the Westminster Palace Hotel in December, 1866, and adopted a series of resolutions, two of which, the 49th and 50th, were identical to the 50th and 51st of the Quebec Resolutions (*cc*). In the rough draft of the bill prepared at the Conference, provision is made for the Governor General's power of disallowance by clause 34 and for the reservation of provincial bills by the combined effect of that clause and clause 39. Clause 34 and the relevant portion of clause 39 read as follows:

> 34. The Governor-General may disallow any Bill passed by the Local Legislature within one year after the passing thereof, and upon the proclamation thereof by the Governor it shall become null and void; and no Bill which shall be reserved by the Governor for the consideration of the Governor-General shall have any force or authority until the Governor-General shall signify his assent thereto and proclamation thereof made within the Province by the Governor of the Province for which such Bill has been passed (*dd*).

(*z*) Reports of the Debates of the House of Assembly of the Province of New Brunswick, 1866 (2nd session), p. 35.
(*aa*) *Ibid*, pp. 26 (Smith) and 49 (Skinner).
(*bb*) *Ibid*, p. 26.
(*cc*) Pope's "*Confederation Documents*", pp. 107-8.
(*dd*) *Ibid*, p. 130.

39. The Governor, subject to the provisions of this Act and any Act of Parliament, and of such instructions as he may from time to time receive from the Governor-General, shall administer the Government of the Province for which he is appointed upon the principles of the British Constitution... he may reserve any Bill passed by the Legislature for the consideration of the Governor-General... (*ee*)

The early drafts of the British North America Act are somewhat incomplete in regard to the provincial constitutions and it is not until the Fourth Draft that provision is made for the disallowance and reservation of provincial enactments. In that draft, however, extensive provisions are laid down in clauses 118 to 120, which read as follows:

118. Where a bill passed is presented to the Lieutenant-Governor for his assent, he shall declare according to his discretion, but subject to the provisions of this Act, either that he assents thereto or that he withholds his consent, or that he reserves the Bill for the signification of the pleasure of the Governor-General.

119. Where the Lieutenant-Governor assents to a Bill he shall by the first convenient opportunity send an authentic copy of the Act to the Governor-General, and if the Governor-General in Council within one year after the passing thereof, thinks fit to disallow the Act, such disallowance being signified by the Governor-General to the Lieutenant-Governor, or by proclamation, shall annul the Act from and after the day of such signification or proclamation.

120. A Bill reserved for the signification of the Governor-General's pleasure shall not have any force unless and until within one year from the day on which it was reserved, the Governor-General signifies to the Lieutenant-Governor, or by proclamation that it has received the assent of the Governor-General in Council; an entry of every such signification or proclamation when transmitted by message from the Lieutenant-Governor, shall be made in the Journals of each House, as the case may be (*ff*).

In the final draft these provisions are not set out at length, the draftsman having in clause 93 adopted the following device:

93. The provisions of Part V. of this Act shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof (*gg*).

Included in Part V of this draft are clauses 56 to 58 which provide, in terms identical to those of sections 55 to 57 of the British North America Act as finally passed, for the powers of disallowing and reserving enactments passed by the Canadian Parliament (*hh*). The device employed in clause 93 served as a model for section 90 of the British North America Act as passed by the Imperial Parliament.

In the speeches delivered in the House of Lords and the House of Commons of the Imperial Parliament, the British attachment to strong central government can readily be perceived. Some would have been happier had the bill provided for a unitary government, but all those who made reference to the powers of disallowance and reservation were at one in believing that they would do valuable service in ensuring that the Central Government would have "those high functions and almost

(*ee*) *Ibid*, p. 133.
(*ff*) *Ibid*, pp. 208-9.
(*gg*) *Ibid*, p. 232.
(*hh*) *Ibid*, pp. 224-5.

sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces..." (*ii*). The bill was passed without division and thereupon the power of the Governor General in Council to disallow provincial statutes and that of Lieutenant-Governors to reserve for the former's assent bills passed by the legislatures became part of the constitution of Canada.

(*ii*) Earl of Carnarvon at col. 563, Hansard's Parliamentary Debates, 1867; see also the speeches of Lord Monk at col. 581; Mr. Adderley at col. 1168; Mr. Cardwell at col. 1178-9.

Chapter 2

JUDICIAL OPINIONS RESPECTING DISALLOWANCE AND RESERVATION

55. Where a Bill passed by the Houses of Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the House (*sic*) of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

. . . . . .

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

These are the sections of the British North America Act, 1867, that established the Dominion's power of reviewing legislation enacted by the provinces originally united at Confederation. As was pointed out by Kerwin, J., in the Supreme Court Reference in 1938 respecting disallowance and reservation, these sections were made applicable to the provinces that entered Confederation subsequent to 1867 by the various Imperial Orders in Council issued by virtue of section 146 of the British North America Act, 1867, and statutes, both British and Canadian, passed to admit new provinces into the Union (*a*).

(*a*) *In the Matter of a Reference concerning the Power of His Excellency the Governor General in Council, under the British North America Act, 1867, to disallow Acts passed by the Legislatures of the Several Provinces and the Power of Reservation of the Lieutenant-Governor of a Province,* 1938, S.C.R. 71 at 90.

The economy in words resulting from the drafting device adopted in section 90 was not achieved without some sacrifice of clarity, at least so far as the power of disallowance is concerned; for, as we shall see in a later chapter, doubts soon arose as to whether this power was vested solely in the Governor General or in the Governor General in Council. No judicial decision has ever decided the point, but there is no lack of *dicta* on it. Some of these *dicta* refer simply to the Governor General's power of disallowance, but in none of these is there any indication that the judge concerned meant to deny that the power is vested in the Governor General in Council (*b*). Most of the *dicta*—and by far the weightiest—are the other way, some judges affirming specifically that the power is vested in the Governor General in Council (*c*), while others contented themselves by stating that the power is assigned to the Federal Government (*d*), and one Judge, Taschereau, J., affirmed quite clearly his opinion that "the power of veto is given to the Governor General in Council, not to the Governor General himself" (*e*). This view must now be considered as settled since the Supreme Court decision in the reference respecting the powers of disallowance and reservation; for, though the question was not specifically before the Court because, as Crocket, J., observed (*f*), the form of the question put to it assumed that the power was vested in the Governor General in Council, the judges were nevertheless unanimously of opinion that the effect of section 90 upon section 56 of the British North America Act was to create the following provision:

> Where the Lieutenant-Governor of the Province assents to a Bill in the Governor General's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to the Governor General, and if the Governor General in Council within One Year after Receipt thereof by the Governor General thinks fit to disallow the Act, such Disallowance (with a Certificate of the Governor General of the Day on which the Act was received by him) being signified by the Lieutenant-Governor of the Province, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, shall annul the Act from and after the Day of such Signification (*g*).

(*b*) *Re Goodhue* (1872), 19 Grant's Chanc. Rep. 366, per Draper, C. J., at 384-5; *Severn v. The Queen* (1878), 2 S.C.R. 70, per Ritchie, J., at 102; *Quay v. Blanchet* (1879), 5 Q.L.R. 43, per Casault, J., at 53; *In re The Initiative and Referendum Act* (1919), A.C. 935, per Viscount Haldane at 944.

(*c*) *Leprohon v. The City of Ottawa* (1877), 40 U.C.Q.B.R. 478, per Harrison, C. J., at 490; *Severn v. The Queen* (1878), 2 S.C.R. 70, per Strong, J., at 109; *Mercer v. Attorney General for Ontario* (1881), 5 S.C.R. 538, per Gwynne, J., at 711-2; *Wilson v. Esquimalt and Nanaimo Railway Co.*, (1922), 1 A.C. 202, per Duff, J., at 209.

(*d*) *Severn v. The Queen* (1878), 2 S.C.R. 70, per Fournier, J., at 131; *Angers v. The Queen Insurance Co.*, (1878), 22 Low Can. Jur. 307, per Ramsay, J., at 309-10; *City of Fredericton v. The Queen* (1880), 3 S.C.R. 505, per Gwynne, J., at 564; *Dobie v. Temporalities Board* (1880), 3 Leg. News 250, per Ramsay, J., at 251; *The Corporation of Three Rivers v. Sulte* (1882), 5 Leg. News 330, per Ramsay, J., at 334-5; *In re Companies Reference* (1913), 48 S.C.R. 331, per Idington, J., at 379.

(*e*) *Lenoir v. Ritchie* (1879), 3 S.C.R. 575 at 624.

(*f*) *Reference re Disallowance and Reservation*, 1938 S.C.R. 71 at 83.

(*g*) *Ibid*, at 81, 85 and 89.

Passing now to the right of Lieutenant-Governors to reserve bills for the assent of the Governor General, there has never been any doubt as to the effect of section 90 of the British North America Act upon sections 55 and 57. According to the judges in the 1938 reference, if in the two latter sections we make the substitutions required by section 90, we derive the following provisions:

> Where a Bill passed by the House or Houses of the Legislature of a Province is presented to the Lieutenant-Governor of the Province for the Governor General's Assent, he shall declare, according to his Discretion, but subject to the provisions of this Act and to the Governor General's Instructions, either that he assents thereto in the Governor General's Name, or that he withholds the Governor General's Assent, or that he reserves the Bill for the Signification of the Governor General's Pleasure.
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> . . . . . .
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> A Bill reserved for the Signification of the Governor General's Pleasure shall not have any Force unless and until within One Year from the Day on which it was presented to the Lieutenant-Governor for the Governor General's Assent, the Lieutenant-Governor signifies, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, that it has received the Assent of the Governor General in Council.
>
> An Entry of every such Speech, Message, or proclamation shall be made in the Journal of the House or of each House, if more than one, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of the Province (*h*).

Having examined what judges have had to say respecting the effect of section 90 of the British North America Act upon sections 55 to 57 of that statute, consideration must now be given to judicial opinions upon the legal limits of the powers. In so far as disallowance is concerned, judges have, from the early days of Confederation, repeatedly stated that in point of law the authority is unrestricted even with respect to statutes over which the provincial legislatures have complete legislative jurisdiction (*i*), and whatever doubts there may have been on the subject were set at rest by the reference to the Supreme Court on disallowance and reservation in 1938 to which further attention must now be given.

The reference to the Supreme Court in 1938 concerning the power of the Governor General in Council to disallow provincial statutes and the Lieutenant-Governors' power of reserving bills passed by provincial legislatures arose under the following circumstances. In 1937 the Province of Alberta passed a series of statutes which the Federal authorities found so objectionable that, for the first time in thirteen years, they used the

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(*h*) *Ibid*, at 81-2, 87-8 and 89-90.

(*i*) *Re Goodhue* (1872), 19 Grant's Chanc. Rep. 366, per Draper, J., at 384; *Reg. v. Taylor* (1875), 36 U.C.Q.B.R. 183, per Draper, C.J., (Strong, Burton and Patterson, JJ., concurring) at 224; *Leprohon v. The City of Ottawa* (1877), 40 U.C.Q.B.R. 478, per Harrison, C.J., at 490; *City of Fredericton v. The Queen* (1880), 3 S.C.R. 505, per Gwynne, J., at 564; *The Corporation of Three Rivers v. Sulte* (1882), 5 Leg. News 330, per Ramsay, J., at 334-5; *In re Companies Reference* (1913), 48 S.C.R. 331, per Idington, J., at 380-2; *Wilson v. Esquimalt and Nanaimo Railway Co.* (1922), 1 A.C. 202, per Duff, J., at 210; see, however, *Quay v. Blanchet* (1879), 5 Q.L.R. 43, per Casault, J., at 53.

power of disallowance. Following upon this the Premier of that province declared that this power no longer existed, and the Legislative Assembly adopted a resolution on September 30, 1937, accepting this declaration and approving the provincial government's determination to implement the disallowed legislation. That such an important question should not remain in doubt, the Dominion Government, pursuant to section 55 of the Supreme Court Act, submitted to the Supreme Court of Canada the following questions:

1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the British North America Act, 1867, still a subsisting power?
2. If the answer to question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?

Subsequently, at the request of the Province of Alberta, the following questions were added:

3. Is the power of reservation for the signification of the pleasure of the Governor General of Bills passed by the legislative assembly or legislative authority of a province vested in the Lieutenant-Governor by section 90 of the British North America Act, 1867, still a subsisting power?
4. If the answer to question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant-Governor subject to any limitations or restrictions, and if so, what are the nature and effect of such limitations or restrictions?

The unanimous answers of the Court to these questions, as certified to the Governor General in Council, were as follows:

1. The first question referred is answered in the affirmative;
2. The second question referred is answered in the negative, save that the power of disallowance shall be exercised within the prescribed period of one year after the receipt of an authentic copy of the Act by the Governor General;
3. The third question referred is answered in the affirmative.
4. The fourth question referred is answered in the negative, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General (*j*).

Alberta's argument that the Governor General has never had authority to disallow provincial statutes and that the right of the Lieutenant-Governor to reserve bills is a power to reserve such bills for the signification of the pleasure of the Sovereign, and not for that of the Governor General, was described by Duff, C. J., who gave the first judgment, as a "novel view". It was, he observed, contrary to the practice that had prevailed since 1867 in regard to these powers and the regularity of these proceedings had never before been questioned. Further, at least two judgments of the Privy Council recognized that the power of disallowance rested with the Governor General.

As to the argument that the literal construction of section 90 was inconsistent with a number of judgments of the Privy Council respecting the legislative authority of the provinces and the position of the Lieutenant-Governor as a representative of the Crown, the learned Chief Justice averred that no such inconsistency existed. The Lieutenant-Governor was undoubtedly the representative of the Crown, but the British North America Act gave the Governor General considerable

(*j*) *Reference re Disallowance and Reservation*, 1938 S.C.R. 71, at 72-3.

authority over him, such as, for instance, the powers to appoint and remove him and to give instructions. He then went on to say that although the British North America Act provided that in assenting to a bill a Lieutenant-Governor should do so in the Governor General's name, it was irrelevant that in performing this function the Lieutenant-Governor did so in a more august form, i.e., in the name of the Sovereign as was the case in several provinces. An assent in that form was of course valid but it in no way affected the law governing these matters, which is to be ascertained from the provisions of the British North America Act.

The Chief Justice had no doubt that the powers were still legally subsisting; they had not been repealed or amended by the Imperial Parliament, nor had they been the subject of any enactment of the Dominion Parliament. In the latter connection he observed that the Dominion Parliament had obtained no new rights to legislate on the matters by virtue of the Statute of Westminster, 1931, for section 7 (1) of that Act made it quite clear that it did not apply to the repeal, amendment or alteration of the British North America Act, and since no Canadian legislation on the subject had been passed, he refused to consider whether the Canadian Parliament had power to legislate respecting reservation by virtue of section 91 (20) (which gives to the Federal Parliament the right to legislate upon any class of subjects expressly excluded from those enumerated in section 92) and section 92 (1) of the British North America Act (which gives to each province power, notwithstanding anything in the Act, to amend the constitution of the province, except as regards the office of the Lieutenant-Governor).

Turning then to a consideration of the extent of the powers, Duff, C.J., noted that in so far as disallowance was concerned the Judicial Committee had stated that "it is indisputable that in point of law the authority is unrestricted" (*k*) and that as to reservation the statute made it abundantly clear that it was subject to no limitation except in so far as the Lieutenant-Governor's discretion may be controlled by the instructions of the Governor General.

The judgments of the other judges, Cannon, Crocket, Kerwin and Hudson, JJ., are in accord with that of the Chief Justice, except upon the question whether a Lieutenant-Governor should assent to a bill in the name of the Sovereign or in that of the Governor General, but on this point they all agreed that an assent in either form was valid.

Cannon, J., dealt more fully than had the other judges with Alberta's contention that the provisions of the Statute of Westminster, 1931, and the Imperial Conferences of 1926 and 1929 had taken away the powers of disallowance and reservation. He said:

> In my opinion these enactments (section 7 of the statute) would give new force, if necessary, to the existing provisions of the British North America Act and preserve them. The Imperial Conferences mentioned in the Alberta factum could not and did not purport to change the law. Moreover, the resolutions of these conferences do not apply to the right of the federal government to disallow or to the right of the Lieutenant-Governor to reserve, but to the right of the Governor General to reserve, and to the right of the Imperial Government to disallow (*l*).

(*k*) *Wilson v. Esquimalt and Nanaimo Railway Co.*, 1922, 1 A.C. 202, at 210.
(*l*) *Reference re Disallowance and Reservation*, 1938 S.C.R. 71, at 82.

Another point that has come up for determination in the Courts is the effect of disallowance upon a disallowed statute. Such a statute has, of course, no effect following its annulment, but what about acts done pursuant to the legislation previous to its disallowance? The question came up for decision in *Wilson v. Esquimalt and Nanaimo Railway Co.* (*m*). In that case the Province of British Columbia had by statute granted to the Dominion Government a tract of land pursuant to an agreement between the two governments, which land the Government of Canada in accordance with the same agreement transferred to the Esquimalt and Nanaimo Railway Company as a subsidy to assist it in constructing a line of railway on Vancouver Island. In 1904 the Provincial Legislature passed the Vancouver Island Settlers' Rights Act which provided that a Crown grant be issued to any settler who had, before a day mentioned in the Act, occupied or improved any land within the tract with the *bona fide* intention of living on the land, if he applied to the Lieutenant-Governor within twelve months and gave proof of his occupation, improvement and intention. A judgment of the Privy Council in 1907 determined that a grant under the statute had the effect of displacing the title of the railway company and vesting the fee simple in the grantee. Subsequently, the time limit to put in an application for a grant was extended by another provincial Act to September 1, 1917. The statute thus extending the time to make an application was disallowed by the Governor General by an Order in Council of May 30, 1918. Previous to this, however, and within the time limit set out in the statute, the appellants, Wilson and MacKenzie, had satisfied all the conditions required by the Vancouver Island Settlers' Rights Act, and a Crown grant was accordingly issued to them on February 14, 1918. In giving the judgment of the Judicial Committee holding that this grant was valid and divested the railroad company of its title to the land granted under it, Duff, J., set out the *ratio decidendi* on this point as follows:

> The question that was principally discussed before their Lordships' Board was that presented by the contention of the respondent company concerning the effect of the disallowance of the Act of 1917, by which it is argued the grants already made to the appellants are nullified. In relation to this question the pertinent sections of the British North America Act are ss. 56 and 90. By the first of these a power of disallowance in respect of Dominion Acts is vested in the Queen in Council; by s. 90 the provisions of s. 56 are (inter alia) made applicable to statutes passed by the Provincial legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years named in s. 56 being reduced to one year.
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> Textually, s. 56 is as follows: (Here the learned judge cited the section.) For the purposes of the present appeal the point under examination turns, as their Lordships think, upon the effect to be ascribed to the words "shall annul the Act from and ofter the day of such signification".
>
> Cases may no doubt arise giving place for controversy touching the application of this phrase, but their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted, and founded upon transactions entirely past and closed, the disallowance of a Provincial statute shall be inoperative.
>
> It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its effect upon the working of the constitutional system set up by the British North America

(*m*) *Wilson v. Esquimalt and Nanaimo Railway Co.* (1922), 1 A.C. 202.

> Act, and from this point of view the construction advocated by the appellants is open to two objections of not a little weight. If private rights that have been finally constituted under Provincial legislation are swept away by disallowance—which may take place at any time up to the expiration of a year after the enactment of the legislation—then Provincial legislation may obviously become the subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would, of course, be much limited in its practical incidence by recognized constitutional conventions restricting the classes of cases in which disallowance is permissible; but it is indisputable that in point of law the authority is unrestricted, and under conceivable conditions the uncertainty touching the fate of Provincial enactments might be productive of some degree of general inconvenience. Another objection of some practical importance lies in the probability that under the proposed construction the Dominion Government when considering the advisability of disallowing a Provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds would encounter embarrassments (otherwise not likely to arise) by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals (*n*).

While the consequences of disallowance upon an annulled statute are now clear, its effect upon a measure expressly or impliedly repealed by a later statute that is subsequently disallowed has not thus far been considered by the courts. It is clear that during the period between the passage of the second statute and the time it is negatived the first statute would be effectively repealed, but what about the time subsequent to disallowance? It is submitted that the repealed Act would revive. The effect of disallowance in the words of the British North America Act is to "annul the Act from and after the day" of its annulment. Where one of the effects of a disallowed statute is the repeal of an Act, the veto of the statute should annul this result for the future as in the case of the other effects of the statute.

Little need be said as to the effect of reservation; a reserved bill simply never becomes law unless assented to within a year from its receipt by the Governor General.

A few other questions that have never been settled by the courts should perhaps be mentioned. When only one section of a statute is objectionable from the Federal point of view, can the Governor General in Council disallow that section only or must it, to achieve that result, disallow the whole Act? Lefroy thought the whole Act must be disallowed and referred in support to a passing remark of Sir John Thompson as well as the observation of the Lord Chancellor during the argument of the Manitoba School Case in 1894 before the Privy Council that "He (the Governor General) disallows an Act as a whole, and could not disallow a section" (*o*). This opinion appears to be consistent with the language of the statute, and it must certainly be accurate when a section is not wholly self-contained but is interdependent with other sections of the Act. The point is not likely to arise; when Ministers of Justice have found an Act objectionable as to one section only, they have recommended that the provincial legislature amend it and on its failure to do so, they have advised that the whole Act be disallowed. Lefroy was also of opinion that the Federal Government did not possess a power of conditional

(*n*) *Ibid*, at 208-10.

(*o*) Lefroy *"Legislative Power in Canada"*, pp. 197, 289.

disallowance; the power, he believed, is absolute (*p*). Lefroy's observations would appear to apply equally to reserved bills. A bill must, it is submitted, be reserved as a whole. And a Lieutenant-Governor cannot assent to a bill after he has reserved it; this appears from the Prince Edward Island case of *Gallant v. The King* (which establishes that a Lieutenant-Governor cannot reconsider a bill to which he has withheld assent), where Campbell, C.J., asserts that only the Governor General can assent to a bill after it has been reserved (*q*).

Something must now be said of the effect that the existence of the powers of disallowance and reservation has had upon the interpretation of sections 91 and 92 of the British North America Act. The existence of these powers was one of the reasons given by Draper, C. J., in *Re Goodhue* for his refusal to accept the argument that a provincial legislature could not validly enact unjust or unwise legislation (*r*). More often it was argued that the British North America Act should be so interpreted as to give no power to the provinces to legislate in such a manner as to interfere with validly enacted Federal legislation, and those who advanced this argument cited as authority the judgments of Chief Justice Marshall who had laid down the principle in the United States that a state could not legislate so as to interfere with the central government of that country. Some judges adopted this argument, accepting as valid this analogy between our constitution and that of the United States (*s*). Others rejected it, pointing out that our constitution differed from that of the United States in that the residue of legislative power in this country was vested in the Federal Government and that that Government had at its disposal the power of disallowance which could be used in preventing any interference with its policies (*t*). But against this view the judges who favoured the argument pointed out the difficulty of exercising the veto power. The point was finally settled by the Privy Council in *Bank of Toronto v. Lambe* (*u*). In that case, it was suggested that if a legislature were held to have power to tax banks it might levy taxes so heavy as to crush a bank out of existence and thereby nullify the power of Parliament to erect banks, and in support of this the judgments of Chief Justice Marshall were cited. In an obvious allusion to the powers of disallowance and reservation, Lord Hobhouse, who gave the judgment of the Board, drew a distinction between our constitution and that of the United States in the following passage:

> Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United

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(*p*) *Ibid.* p. 289.

(*q*) *Gallant v. The King* [1949], 2 D.L.R. 425 at 430; (1949), 23 M.P.R. 48 at 53.

(*r*) *Re Goodhue* (1872), 19 Grant's Chanc. Rep. 366 at 384-5.

(*s*) *Leprohon v. City of Ottawa* (1877), 40 U.C.Q.B.R. 478, per Harrison, C.J., (diss.) at 490; *Severn v. The Queen* (1878), 2 S.C.R. 70, per Richards, C.J., and Fournier, J., at 96 and 131.

(*t*) *Reg. v. Taylor* (1875), 36 U.C.Q.B.R. 183, per Draper, C.J., (Strong, Burton and Patterson, JJ., concurring) at 224; *Leprohon v. City of Ottawa* (1877), 40 U.C.Q.B.R. 478, per Morrison, J., at 500-1; *Severn v. The Queen* (1878), 2 S.C.R. 70, per Ritchie and Strong, JJ. at 102 and 109; *Angers v. The Queen Insurance Company* (1878), 22 Low. Can. Jur., 307, per Ramsay, J., (diss.) at 309-10; *Dobie v. Temporalities Board* (1880), 3 Leg. News 250, per Ramsay, J., (diss.), at 251; *The Corporation of Three Rivers v. Sulte* (1882), 5 Leg. News 330, per Ramsay, J., (Dorion, C.J., Monk, Tessier and Baby, JJ., concurring) at 334-5.

(*u*) *Bank of Toronto v. Lambe* (1887), 12 A.C. 575.

States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sect. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sect. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament (*v*).

Before concluding this chapter it might be well to mention what judges have said respecting the occasions when the power of disallowing statutes might properly be exercised. Too much should not be made of these statements, for the courts could not be called upon to resolve this problem because it comes within the political not the juridical field. It is interesting to note, however, that a similar divergence of opinion exists in these judicial utterances as in the statements of the Fathers of Confederation. Thus Draper, C. J., in *Re Goodhue,* expressed his belief that "The Governor General..., as the representative of the sovereign, is entrusted with authority—to which a corresponding duty attaches,—to disallow any law contrary to reason or to natural justice and equity" (*w*). This marks one extreme. At the opposite pole is Casault, J.'s opinion that, even legally, "the veto... allowed to the Governor General can... only be exercised when a provincial law makes... encroachments or trespasses upon the rights of the Federal Parliament" (*x*). Most of the statements fall between these two extreme views and indicate that most Judges believed that statutes could properly be disallowed if they were *ultra vires* or conflicted with Dominion policies or interests (*y*).

It is also interesting to note that, like some of the statesmen during the Confederation debates, a number of judges warned that the power could not frequently be exercised. Thus Fournier, J., though affirming that while "this extraordinary prerogative... could even be applied to a law over which the Provincial Legislature had complete jurisdiction", nevertheless pointed out that it will always be "delicate" and "difficult"

(*v*) *Ibid.* at 587; see also *In re Companies Reference* (1913), 48 S.C.R., 331, per Idington, J., at 379-82 and Duff, J., at 422-6.

(*w*) *Re Goodhue* (1872), 19 Grant's Chanc. Rep. 366 at 384.

(*x*) *Quay v. Blanchet* (1879), 5 Q.L.R. 43 at 53 (translation).

(*y*) *Reg. v. Taylor* (1875), 36 U.C.Q.B.R. 183, per Draper, C.J., (Strong, Burton and Patterson, JJ., concurring) at 224; *Severn v. The Queen* (1878), 2 S.C.R. 70, per Ritchie and Strong, J.J., at 102 and 109; *The Corporation of Three Rivers v. Suite* (1882), 5 Leg. News 330, per Ramsay, J., (Dorion, Monk, Tessier and Baby, JJ., concurring), at 334-5; *Mercer v. Attorney General for Ontario* (1881), 5 S.C.R. 538, per Gwynne, J., at 711-2.

for the Federal Government to substitute its opinion for that of the legislative assemblies, and Richards, C. J., averred that the annulment of provincial statutes passed after due deliberation will "always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the act is... clearly beyond the power of the Local Legislature" (*z*).

Perhaps the most interesting comment made by a judge respecting the exercise of the power of disallowance is that of Idington, J., in *In re Companies Reference* (*aa*). This Judge believed that though the veto power was capable of abuse it was intended as a beneficent power and was capable of great good service in protecting the rights of everyone in the Dominion, whether corporate or individual. He was of opinion, however, that it was virtually impossible to exercise the power in relation to matters affecting provincial interests only as can be seen from the following paragraph:

> To seek to apply it when the proposed legislation can only affect the rights of the people of the province concerned, may be offensive, and in the domain of practical politics be an impossibility. Yet when the legislation proposed would manifestly improperly affect people elsewhere, or corporations created outside the province, such as the Dominion corporations resting upon the residual power of Parliament, or those of other provinces, and thus affect the people of the whole Dominion, surely, the exercise of the power in that regard ought to be, and to be held, practicable (*bb*).

In later years, judges have not often expressed opinions as to when disallowance or reservation might be exercised, believing, no doubt, with Kerwin, J., that

> The circumstances under which the powers referred to may be exercised are matters upon which this Court is not constitutionally empowered to express an opinion since the power of disallowance is granted by the Act to the Governor General in Council and the power of reservation is to be exercised by the Lieutenant-Governor "according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions" (*cc*).

(*z*) *Severn v. The Queen* (1878), 2 S.C.R. 70, per Richards, C. J., at 96 and Fournier, J., at 131.

(*aa*) *In Re Companies Reference* (1913), 48 S.C.R. 331.

(*bb*) *Ibid*, at 381-2.

(*cc*) *Reference Disallowance and Reservation*, 1938 S.C.R. 71 at 95.

Chapter 3

PROCEDURE

Some of the procedure respecting the exercise of the powers forming the subject of this study is prescribed by the terms of the British North America Act itself; other points are dealt with in the instructions of the Governor General to the Lieutenant-Governors. In addition, the Department of Justice Act and reports of Ministers of Justice approved by His Excellency in Council determine many of the remaining steps that are not covered by the British North America Act or the Governor General's instructions.

First, of the power of disallowance. Read in conjunction, sections 56 and 90 of the British North America Act provide that when a Lieutenant-Governor has assented to a bill in the Governor General's name, he shall by the first convenient opportunity send an authentic copy thereof to the Governor General. The manner in which the Lieutenant-Governor is to perform this duty is now spelled out by the instructions issued to him by the Governor General. This was not always the case. For the first twenty-five years after Confederation, though the Lieutenant-Governors' Commissions authorized them to execute their powers, according, *inter alia*, "to such instructions as... are hereunto annexed or which may from time to time be given to you... under the Sign Manual of our Governor General..., or by Order of our Privy Council for Canada", no instructions were annexed to these Commissions. Finally, in 1892, instructions were issued, the fourth and fifth paragraphs of which read as follows:

> IV. The Lieutenant-Governor is to take care that all Laws assented to by him in my name, or reserved for signification of my pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margin, and be accompanied in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such Laws.
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> V. Whenever the Lieutenant-Governor assents to a Bill, he shall, within ten days thereafter, send an authentic copy of the Act to the Secretary of State of Canada (*a*).

In practice the provincial statutes were not necessarily transmitted to the Secretary of State as soon as assent was given to them. The usual procedure followed by the Lieutenant-Governor was to transmit all the statutes of a session together. In 1950 the instructions were modified to conform to this practice and Paragraph V now reads as follows:

> V. The Lieutenant-Governor shall, within ten days after the prorogation of the Legislature or after adjournment of the Legislature for a period of more than ten days or for an indefinite period, send an authentic copy of each Act to which he has assented during the session of the Legislature or during the session of the Legislature prior to the commencement of the adjournment, as the case may be, to the Secretary of State of Canada (*b*).

(*a*) P.C. 1574 dated the 16th day of June, 1892.
(*b*) P.C. 3431 dated the 19th day of July, 1950.

In some provinces, the statutes are not sent by the Lieutenant-Governor personally but by a provincial officer. Thus the Ontario statutes are sent by the Clerk of the Legislative Assembly, those of Nova Scotia and Alberta by the Deputy Provincial Secretary, and those of New Brunswick by the Queen's Printer.

Once received by the Secretary of State, the statutes are then sent to the Department of Justice for consideration. The duty of examining provincial legislation was cast upon the Minister of Justice by section 2 of the first Department of Justice Act, chapter 39 of the statutes of 1867-8, assented to on the 5th day of May, 1868. This section is the prototype of section 4 of the present Department of Justice Act, the relevant part of which is in the following terms:

4. The Minister of Justice shall

. . . . . .

(*d*) advise upon the legislative Acts and proceedings of each of the legislatures of the provinces of Canada... (c)

Shortly after the passing of the Department of Justice Act of 1867-68, Sir John A. Macdonald, the first Minister of that Department after Confederation, reported to the Governor General in Council as to the manner in which the duty of examining provincial statutes should be fulfilled. The report, which is dated the 8th day of June, 1868, was approved by the Governor General in Council on the following day and a copy was thereupon despatched to each of the provinces then making up the union. It reads as follows:

DEPARTMENT OF JUSTICE, OTTAWA,
8th June, 1868.

The undersigned begs to submit for the consideration of your Excellency, that it is expedient to settle the course to be pursued with respect to the Acts passed by the provincial legislatures.

The same powers of disallowance as have always belonged to the Imperial Government with respect to the Acts passed by colonial legislatures, have been conferred by the Union Act on the Government of Canada. Of late years Her Majesty's Government has not, as a general rule, interfered with the legislation of colonies having representative institutions and responsible government, except in the cases specially mentioned in the instructions to the governors, or in the matters of imperial and not merely local interest.

Under the present constitution of Canada, the general government will be called upon to consider the propriety of allowance or disallowance of provincial Acts much more frequently than Her Majesty's Government has been with respect to colonial enactments.

In deciding whether an Act of a provincial legislature should be allowed or sanctioned, the government must not only consider whether it affects the interest of the whole Dominion or not; but also, whether it be unconstitutional, whether it exceeds the jurisdiction conferred on local legislatures, and in cases where the jurisdiction is concurrent, whether it clashes with the legislation of the general Parliament.

As it is of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and the general interests of the Dominion imperatively demand it, the undersigned recommends that the following course be pursued:

(c) R.S.C. 1952, c. 71.

That on receipt, by your Excellency, of the Acts passed in any province, they be referred to the Minister of Justice for report, and that he, with all convenient speed, do report as to those Acts which he considers free from objection of any kind, and if such report be approved by your Excellency in Council that such approval be forthwith communicated to the provincial government.

That he make a separate report, or separate reports, on those Acts which he may consider:—

1. As being altogether illegal or unconstitutional;
2. As illegal or unconstitutional in part;
3. In cases of concurrent jurisdiction, as clashing with the legislation of the general parliament;
4. As affecting the interests of the Dominion generally:

And that in such report or reports he gives his reasons for his opinions.

That, where a measure is considered only partially defective, or where objectionable, as being prejudicial to the general interests of the Dominion, or as clashing with its legislation, communication should be had with the provincial government with respect to such measure, and that, in such case, the Act should not be disallowed, if the general interests permit such a course, until the local government has an opportunity of considering and discussing the objections taken, and the local legislatures have also an opportunity of remedying the defects found to exist.

All of which is respectfully submitted.

JOHN A. MACDONALD. (*d*)

The cases mentioned in the report as to when the power of disallowance may properly be exercised will form the subject matter of succeeding chapters. We are here only concerned with the steps to be taken by the Minister of Justice in considering statutes from the point of view of the exercise or non-exercise of the power of disallowance. Macdonald appears to have followed the procedure set out in the report fairly closely. Every year he would report on the statutes of each province that he considered unobjectionable and make a separate report upon the statutes of a province to which he found objection. Subsequent Ministers of Justice departed in varying degrees from the procedure established by Macdonald. While it would serve little useful purpose to describe at length the differences in the procedure followed by the various Ministers of Justice, it may be noted that it soon became common for the Minister to make a single report on the statutes of a province passed at one session in which he dealt with both the objectionable and unobjectionable legislation. Again, it became the practice simply to state, in respect of statutes to which no specific objections were made, that they be left to their operation rather than to assert that they were unobjectionable.

But while there was some variation between the practice of succeeding Ministers of Justice, until the early 1920's all the Ministers of Justice reported at length upon the statutes that they found objectionable. This has not been the case since that time. Nowadays, while a special report is occasionally made upon a statute that the Minister considers highly objectionable from a Federal point of view or against which a strong petition or other protest has been received, the usual course is to deal with all the statutes of one session in a single report in which no (or if

(*d*) W. E. Hodgins, "*Dominion and Provincial Legislation 1867-1895*" (herein referred to as Dom. & Prov. Legis.), pp. 61-2.

any, little) comment is made as to whether or not any of them are objectionable, it being simply stated that the statutes be left to such operation as they may have.

Macdonald's report also states that the Minister should report with all convenient speed upon the statutes that he considers unobjectionable. In practice, it is usual to allow some time to elapse after receiving provincial legislation before a report is made thereon; this permits persons interested to raise any objections that they may have to such legislation.

In this connection it should be noted that the power of the Governor General is in no way diminished by the approval of a report stating that certain statutes are unobjectionable or that they be left to their operation, and some statutes have in fact been disallowed after the approval of such a report (*e*).

After setting out the objections that may properly be raised in respect of a provincial statute, Macdonald's report then indicates that where an Act is objectionable on any but the first ground mentioned therein, i.e., that the Act is totally invalid, communication should be had with the province concerned to discuss the objectionable features thereof. As to the qualification made by Macdonald, it is doubtful if it would be followed today. Even if an Act were patently *ultra vires,* it is highly improbable that disallowance would be recommended without communicating with the province concerned, unless it was evident from the circumstances that such a step would be useless. The practice of communicating with the provinces has been fruitful; probaly far more Acts have been amended or repealed after such communication than it has been found necessary to disallow, and, as in the case of actual disallowances, the amendment or repeal of statutes under such circumstances occurred far more frequently in the early days than at a later period. Since the early 1920's, such communication has usually been limited to cases where highly objectionable legislation is involved.

Communication is also had with the province where a bill is the subject of a petition which, on examination, proves to be of a serious nature, whether or not the grounds alleged in the petition are such as would, within the limits the Ministers of Justice have set themselves, justify a recommendation of disallowance. In a case of this kind it is customary to request that the province make such comments upon the petition as it deems proper.

When it is decided to disallow an Act, an Order in Council is passed accordingly and this, together with a certificate of the Governor General of the day on which he received the Act, is transmitted to the Lieutenant-Governor of the province. In addition, a second Order in Council is passed approving of the Report of the Minister. The report is attached to this Order in Council and is also sent to the Lieutenant-Governor. The Lieutenant-Governor must then, in accordance with the provisions of sections 56 and 90 of the British North America Act, signify this disallowance by speech or message to the house or houses of the legislature or by proclamation. While the statute thus provides an alternative

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(*e*) Francis H. Gisborne and Arthur A. Fraser, *"Provincial Legislation 1896-1920"* (herein referred to as Prov. Legis.) pp. 85-86, 89-91.

to the manner in which the Lieutenant-Governor is to signify the disallowance of a statute by the Governor General, the following paragraph of his instructions lays down the rule that he must in any case make the proclamation:

> VI. The Lieutenant-Governor on receipt of a copy of an Order in Council disallowing an Act, with my certificate of the date on which the Act was received by me, shall forthwith make proclamation in the said Province of such certificate, and of the disallowance of the said Act.

When the Lieutenant-Governor has signified the disallowance of a statute in either of the manners provided by the British North America Act, such statute is annulled from and after the day of such signification.

Turning now to the Lieutenant-Governor's power of reserving bills for the pleasure of the Governor General, it will be seen, by blending sections 55 and 90 of the British North America Act, that a Lieutenant-Governor may, in his discretion and subject to the provisions of that Act and his instructions, reserve a bill for the pleasure of the Governor General.

Paragraph IV of the instructions, as we have seen, provides that when a bill is reserved it should be fairly abstracted in the margin and, where it appears necessary to the Lieutenant-Governor, accompanied by a statement explaining why the law was proposed.

When a bill is reserved it is the duty of the Minister of Justice to deal with it by virtue of section 4 of the Department of Justice Act already cited. No general report was ever made concerning the manner in which this duty should be performed as was the case with the complementary power of disallowance. In dealing with such bills, however, the Minister usually reports to the Governor General recommending that assent be given or refused, and a copy of the report is transmitted to the Lieutenant-Governor. But this practice has not been invariable; a number of reserved bills do not appear to have been reported upon by the Minister. The bill in such a case never becomes law, for according to section 57 of the British North America Act assent must be given to it by the Governor General in Council before it can have validity. When it is decided to assent to a reserved bill, an Order in Council is passed and a copy thereof forwarded to the Lieutenant-Governor.

Upon learning that assent has been given to a bill, the Lieutenant-Governor must then by speech or message to the house or houses of the legislature or by proclamation signify that it has received the Governor General's assent. Where a speech or message is made signifying the assent, section 57 further provides that it shall be entered in the journal or journals of the house or houses of the legislature and a duplicate thereof, duly attested, must be delivered to the proper officer to be kept among the records of the province.

Chapter 4

RESPONSIBILITY FOR THE EXERCISE OF THE POWERS OF DISALLOWANCE AND RESERVATION

The question as to what persons or body should bear the responsibility for the exercise of the powers of disallowance and reservation was not settled for several years after Confederation, and it came up for so much discussion at the time as to merit separate consideration here. In so far as the former power is concerned, the first official statement we have on the subject is that of Sir John A. Macdonald in his report of June 8, 1868, setting out the course to be pursued by the Federal Cabinet in dealing with Acts passed by the local legislatures, where he stated that "the same powers of disallowance as have always belonged to the Imperial Government in dealing with Acts passed by the colonial legislatures have been conferred by the Union Act on the Government of Canada". The following year, the Secretary of State for the colonies, Lord Granville, replying to a letter seeking instructions respecting the course to be followed in dealing with reserved provincial bills made the remark that "If the Governor General were advised by his ministry to disallow any provincial Act as illegal or unconstitutional, it would, in general, be his duty to follow that advice, whether or not he concurred in their opinion" (*a*). This principle, it should be noted, was expressed as a general rule; just when the Governor General might deviate from it was not stated and the Canadian authorities made no enquiry about the matter. A few years later, on December 13, 1872, the Lord President of the Imperial Privy Council in refusing to take any action upon the Colonial Office's request that the Judicial Committee, in compliance with a resolution of the Canadian House of Commons, consider the validity of the New Brunswick School Act of 1871, an Act that a large proportion of the House of Commons had voted to disallow, said

> It appears to his Lordship that, as the power of confirming or disallowing provincial Acts is vested by the statute in the Governor General of the Dominion of Canada, acting under the advice of his constitutional advisers, there is nothing in this case which gives to Her Majesty in Council any jurisdiction over this question, though it is conceivable that the effect and validity of this Act may, at some future time, be brought before Her Majesty, on an appeal from the Canadian courts of justice (*b*).

Up to 1872, then, the only body that had been mentioned by the British and Canadian authorities as having a constitutional right to advise the Governor General in exercising this power was Her Majesty's Privy Council for Canada, in other words, the Federal Cabinet. A change came in 1873. In that year a resolution was moved in the Canadian House of Commons regretting that a number of amendments to the New Brunswick School Act of 1871 had not been disallowed and recommending that they should be disallowed. Sir John A. Macdonald strongly opposed the motion. It constituted, he thought, an attempt at using the prerogative and

(*a*) Dom. & Prov. Legis., pp. 63-4.
(*b*) *Ibid*, p. 69.

the Canadian Parliament had, therefore, no jurisdiction in the matter. He further believed that Her Majesty's advisers in England would not permit the power of disallowance to be used in such a case. Here, in part, is what he is reported as saying:

> The British North America Act said that the Queen might at any time within two years exercise the Royal prerogative in disallowing an Act of this Parliament, and that the Governor-General, as her representative, might at any time within one year exercise the Royal prerogative in the disallowance of a bill from the Local Legislatures... It (the resolution) was distinctly an attempt to using (*sic*) a branch of the prerogative... This resolution was an unwarrantable invasion of the prerogative of the Crown ...Of course it would not be a vote of want of confidence in the Administration, because that was not an expression of opinion that the House had no confidence in the Government in their administration of the Dominion. But this was an appeal to the Government to take a certain course. The Governor-General had his instructions which applied as well to the Acts passed by the Local Legislature, and he would ask if his Excellency, supposing the address was adopted, were to ask the advice of Her Majesty's Government at Home, what instructions he would be likely to receive? Her Majesty's Government would refuse to interfere with any bill which was within the competence of the Local Legislature (*c*).

The resolution was passed, however, despite the administration's opposition, but rather than recommend the disallowance of the Acts, Macdonald advised instead that the Governor General seek instructions as to what course he should pursue (*d*). Thus counselled, the Governor General sought instructions on the point, and in reply the Earl of Kimberley, then Secretary of State for the Colonies, advised:

> 1. That these Acts of the New Brunswick legislature are, like the Acts of 1871, within the powers of that legislature.
>
> 2. That the Canadian House of Commons cannot constitutionally interfere with their operation by passing a resolution such as that of the 14th of May last. If such a resolution were allowed to have effect, it would amount to a virtual repeal of the section of the British North America Act, 1867, which gives the exclusive right of legislation in these matters to the provincial legislatures.
>
> 3. That this is a matter in which you must act on your own individual discretion, and on which you cannot be guided by the advice of your responsible ministers of the Dominion.
>
> 4. That these Acts of the New Brunswick legislature, being merely Acts for better carrying out the Act of 1871, and for getting rid of technical objections to the assessments thereunder, it would be in accordance with the Imperial Act, and with the general spirit of the constitution of the Dominion as established by that Act, for you to allow these Acts to remain in force (*e*).

This expression of opinion did not long remain unchallenged by the Mackenzie Government, which shortly afterwards wrested power from Macdonald. A Committee of the Canadian Privy Council was appointed to study the matter and on March 8, 1875, it reported in part as follows:

> The power of disallowance is here clearly vested in the Governor General, in the same manner as the power of assent or disallowance is vested in Her Majesty by sections 56 and 57, that is, in the Queen in Council.

(c) Parliamentary Debates, Canada, 1873, consisting of clippings from the *Ottawa Times* and *Toronto Mail*, p. 177; it may be found in the Parliamentary Library, Ottawa.

(d) Dom. & Prov. Legis., p. 701; see also Debates of the House of Commons, 1875, p. 1008.

(e) Dom. & Prov. Legis., p. 702.

> The committee, therefore, humbly submit that the passage above quoted would, if acted upon, destroy all ministerial responsibility and impose on the Governor General a responsibility not intended by the statute, and at variance with the constitution. It would also be impracticable in operation, as some practical legal authority must examine the statutes passed by the local legislatures, to enable the Governor General to arrive at an intelligent decision. If this could be done by importing the services of any one outside the Privy Council, it would establish a subsidiary body, not contemplated by the constitution. If done by the minister or ministers, then the ministerial responsibility at once attaches (*f*).

The Committee quoted in support of this view the opinion given by the Lord President of the Imperial Privy Council in 1872 and ended its report with a recommendation that a copy be transmitted by His Excellency to Her Majesty's Government.

Shortly afterwards the matter was raised in the House of Commons by Mr. Edward Blake, who moved a resolution protesting against the instructions forwarded by Lord Kimberley and affirming that the power of disallowance was vested in the Governor General acting under the advice of ministers responsible to Parliament. In his speech, Blake observed that these instructions were "destructive of the principle of responsible government". Sir John A. Macdonald seems to have reconsidered his opinion of a few years previous, for he expressed agreement with Blake's view. So did Mackenzie, and indeed not one dissenting voice was raised against it. Mackenzie, however, persuaded Blake to withdraw his motion by indicating that the issue had already been raised with the Imperial authorities (*g*).

Later in the year Blake became Minister of Justice and when the new Colonial Secretary, the Earl of Carnarvon, defended his predecessor's action, the duty devolved upon him to reply to the British views. Considerable correspondence thereupon ensued in which the two men expounded their ideas upon the matter (*h*).

Lord Carnarvon's views may be summarized as follows. As to the question whether the power of disallowance was vested in the Governor General or the Governor General in Council, he believed this could be finally settled only by a judgment of the Judicial Committee of the Privy Council. He suggested that the view be considered, though he did not press it, that the British North America Act clearly distinguished between the Governor General and the Governor General in Council and that if the latter had been intended in section 90, that phrase would have been used. He felt, however, that there was no practical necessity for having the question determined and that it was more in accordance with the spirit of the constitution that a rigid rule of action should not be established.

Carnarvon believed that the power of disallowance should be exercised in the same manner as the prerogative of pardon, a prerogative in respect of which he and his predecessors in office, Granville and Kimberley, had instructed the Governor General of another colony that, unless Imperial interests or policies were involved, the Governor General should seek the advice of his Council but that in the end he was "bound to act on

(*f*) *Ibid*, p. 69.
(*g*) Debates of the House of Commons, 1875, pp. 1003-10.
(*h*) Dom. & Prov. Legis., pp. 65-78; Can. Sess. Pap., 1876 (No. 116).

his own independent judgment". He agreed with Blake that the Governor General should not act on his own unaided discretion, have recourse to secret counsellors or act upon the instructions of the Colonial Office but must be advised by his ministers. He believed, however, that having "had recourse to the advice of his ministers, and having fully heard them, the Governor General would be thoroughly instructed as to the merits of the case, and would then be competent to judge of the course which it would be advisable for him to take; he would be acting under the advice of his ministers, notwithstanding that he might not feel himself able to act according to that advice" (*i*).

Where a prolonged difference of opinion between the Governor General and his advisers prevailed, Carnarvon assumed that, since in his opinion the British North America Act did not contemplate Dominion interference with validly enacted provincial legislation, these Ministers would not feel themselves justified in retiring from the administration of public affairs on account of the course taken by the Governor General on the subject, it being a matter upon which the Dominion Parliament could not hold itself responsible. Lord Carnarvon buttressed his argument that the British North America Act did not contemplate Federal interference with *intra vires* provincial legislation by suggesting that if the Dominion ministers had such a power of interference "the consequence would be a virtual repeal of that section of the 'British North America Act, 1867' which gives the exclusive right of legislation in certain matters to the provincial legislatures", for they would have the power of controlling the enactment or operation of provincial legislation.

In his approved reports to Council upon the subject, Blake traversed every argument advanced by Lord Carnarvon. Practically, he believed, the question as to whether the power was legally vested in the Governor General or the Governor General in Council could not be determined by the Judicial Committee because the only situation in which the question could come up for judicial determination was if the Governor General purported to disallow an Act without recourse to the advice of his Privy Council. (In the instant case this was impossible, for the only situation that might have arisen was the refusal of the Governor General to disallow the New Brunswick School Act if he had been so advised, a set of facts that would not in any case give rise to anything of which a court of law could take cognizance.)

Blake believed that the British North America Act clearly set out the course to be taken in exercising the power of disallowance. The power was by sections 56 and 90 of that Act vested in the Governor General in Council, which by section 13 meant "the Governor General acting by and with the Advice of the Queen's Privy Council for Canada". Section 90 did not specifically mention the Governor General in Council because the grammatical construction of section 56 made this unnecessary.

But even if the power of disallowance had been legally vested in the Governor General alone, Blake argued, that officer would still constitutionally be bound to act according to the advice of his ministers in the same way as the Queen was bound to follow the advice of her ministers in exercising her veto power over Federal legislation. If the Governor

(*i*) Dom. & Prov. Legis., p. 76.

General failed to act on its advice, Council should resign, leaving the Governor General to find advisers who would support his policy. Resignation should also follow if the ministers could not obtain the support of the House of Commons for their advice. In this, as in the exercise of other Federal powers, the ministers were responsible to Parliament.

Without admitting the accuracy of the course suggested in the case of the prerogative of pardon, Blake averred that reference to the procedure respecting that power was not apt. The pardoning power was a high prerogative vested in Her Majesty and delegated by her to her confidential officer and capable of being used by that delegate in matters involving Imperial or foreign interests. The power of disallowing provincial legislation, on the other hand, was vested in the Governor General in Council, not the Queen, and affected matters of provincial and Canadian interests. It was not possible to deal with this power on principles different from other powers of government. In effect, he concluded, the discussion involved the whole question of responsible government, for if Lord Carnarvon's principle were conceded here it would be impossible to resist its application to our entire system.

As to the argument that the Governor General need only have recourse to his Council but need not follow its advice, this appeared to Blake to be a case where the Governor would be acting against, rather than under, the advice of his ministers. His judgment would be unaided, for he would be acting on views evolved by himself alone, and not those of his constitutional advisers.

Finally Blake replied that the argument that his view would effect a virtual repeal of section 91 of the Act was in strictness an argument to change the existing law and not one to prevent the adoption of his construction. The same argument could be made against the Queen's veto power over Canadian legislation. Actually, the danger apprehended was not a real one. This was due to the fact that the Canadian Parliament was composed of representatives from the various provinces who would jealously guard against any encroachment upon the proper legislative sphere of the provinces.

It should be noted that the question to be determined was not whether the Governor General should act pursuant to the advice of his Council or whether he should act in accordance with the instructions of the Colonial Office. Nowhere in the correspondence is there a claim by the British of any jurisdiction in the matter. Indeed, even while this controversy was going on Carnarvon advised in respect of a memorial addressed to the Imperial authorities to disallow two statutes respecting the union of certain Presbyterian Churches that the measures, "being Acts of the provincial legislature, their confirmation or disallowance rests, not with the Imperial authorities, but with those of the Dominion of Canada..." (*j*).

Shortly stated, Lord Carnarvon's view was that legally the power of disallowance is vested in the Governor General alone and that in any case he may on occasion properly refuse to act upon the advice of his Council. Blake, on the other hand, was convinced that legally the power is vested in the Governor General in Council, but even if this were not so,

(*j*) *Ibid*, pp. 140-1.

he was of opinion that the correct constitutional procedure in exercising the power is that the Governor General should always be guided in this matter by the views of his Council.

There is no doubt that Blake had the better side of the argument. With respect to the legal question of whether the power is vested in the Governor General or in the Governor General in Council, we have seen that it has been repeatedly affirmed judicially that the power is vested in the Governor General in Council. In any case, in practice, the Governors General have, in this matter, always acted upon the advice of their ministers. Should a Governor General refuse so to act at the present day, the ministry could overcome this refusal by recommending his recall and replacement by another, for it is now a convention of our constitution that the Queen exercises the powers of appointing and removing the Governor General on the advice of Her Canadian ministers. As to the question whether the Canadian House of Commons has any jurisdiction respecting disallowance, that body has on many occasions expressed its views as to whether it considered the disallowance of a provincial statute desirable or not.

We must now turn our attention to the power of reservation. That Sir John Macdonald believed that the Imperial authorities should exercise a measure of supervision over reserved bills from the provinces can be demonstrated by reference to a private letter which he addressed to Sir John Young, the Governor General of the day, on January 18, 1869, in which he advised that the Governor General should apply for instructions from Her Majesty's Government about "a matter of great importance" (*k*). This "matter of great importance" was the procedure that should be followed by the Governor General to determine Her Majesty's pleasure upon provincial bills reserved for the consideration of the Governor General. Macdonald pointed out that before Confederation the Governor of each province had power to give, withhold or reserve Her Majesty's assent to bills of the legislature and that in addition he was specifically enjoined by his instructions to reserve certain classes of bills. This practice had been continued with respect to legislation of the Federal Parliament, but in the case of provincial legislation, while the British North America Act provided that the Lieutenant-Governor might reserve bills for the Governor General's consideration, both the Act and the Governor General's instructions were silent as to the manner in which the Governor General should take Her Majesty's pleasure on such reserved legislation. Macdonald assumed that in the absence of instructions on this point His Excellency would be guided by his Council in giving his assent to, or reserving, such bills. He then went on to suggest that Sir John Young should "have specific instructions, in your capacity as an Imperial officer, as to your course:—1st. When an Act of a provincial Legislature relates to any of the classes or subjects mentioned in the 7th paragraph of the Royal instructions. 2nd. When it is, in your opinion, unconstitutional or in excess of the power of the local body." The seventh paragraph of the Royal instructions to which Macdonald referred set out the classes of bills which, if passed by the Federal Parliament, it would be the duty of the Governor General to reserve. Similar instructions had been issued to the Governors of the various provinces before

(*k*) Sir Joseph Pope, *"Memoirs of Sir John A. Macdonald"*, Vol. II, App. XVI, pp. 297-8.

union. Macdonald then explained that, although the powers of the provincial legislatures were considerably more limited than before Confederation, they nevertheless could competently enact legislation falling within some of the categories listed in the seventh paragraph of the instructions.

Macdonald's reason for recommending that Sir John Young seek instructions with regard to the second group of provincial legislation above mentioned was as follows. Doubts had arisen as to the respective jurisdictions of the local and general legislatures, and whenever there was doubt the local legislatures had a tendency to give themselves the benefit of it and construe their powers in the largest sense, thus giving rise to a situation that in the United States had ended in civil war. It was true a check on such unconstitutional legislation existed in the veto power of the Governor General, but Macdonald feared that the Governor General might have a body of advisers composed of "States rights" men interested more in sectional than in general interests. The danger was particularly strong at that time, he believed, because the General Government was new and there were no associations, political or historical, connected with it as was the case with the local governments. He felt, on the other hand, that there would be no difficulty in making the provincial legislatures stay within their legislative bounds if some principle of action were laid down, and steadily adhered to by the Colonial Office.

The advice thus tendered him was accepted by Sir John Young who, on March 11, 1869, in a dispatch to the Secretary of State for the Colonies, Earl Granville, (that in large part simply paraphrased Macdonald's language) applied for instructions upon the question (*l*). Granville replied stating that, with one qualification, the prohibitions in the seventh paragraph of the Royal instructions rested on Imperial policy and therefore the Governor General was not at liberty to give his assent to any reserved bill coming within that paragraph "even on the advice of your ministers" and in addition he was bound to instruct the Lieutenant-Governors not to give their assent to such bills. The qualification to which he referred was the provision providing that assent be reserved in case a bill made a grant to the Governor concerned. It was for the Federal Government to decide whether a bill making a grant to a Lieutenant-Governor should be sanctioned. If the Governor General were advised by his ministers to assent to a statute that he considered illegal, it was his duty to refer the question to the Secretary of State for instructions. The same course might be taken where the bill recommended for his sanction was gravely unconstitutional (i.e., not illegal, but violating a constitutional principle) but it was the duty of the Governor General in each case to decide whether the objection to an Act, not of doubtful legality, was sufficiently grave to warrant a refusal of the advice given (*m*).

Macdonald appears to have been satisfied with these instructions, and on July 17, 1869, an Order in Council was passed on his recommendation authorizing their transmission to the Lieutenant-Governors of the several provinces together with a copy of the seventh paragraph of the Royal instructions "for their information and guidance" (*n*).

(*l*) Dom. & Prov. Legis., pp. 62-3.
(*m*) *Ibid*, pp. 63-4.
(*n*) Can. Sess. Pap. 1870 (No. 35) pp. 25-7.

No bill ever appears to have been reserved by a Lieutenant-Governor on any ground listed in the seventh section of the Royal instructions. In 1872, however, the Lieutenant-Governor of British Columbia reserved a bill because it appeared to conflict with the Royal instructions issued to Governors of Colonies before 1867. Reporting thereon, Macdonald affirmed, in advising that assent be given to the bill, that while every deference would be paid to the terms of the instructions to the Governors of the Colonies, the instructions to the Lieutenant-Governors of the provinces should come from the Governor General in Council, and that in addition no instruction such as that referred to by the Lieutenant-Governor had been placed in the Royal instructions to the Governor General since 1867 (*o*).

When, in 1878, the seventh paragraph was removed from the Royal instructions on the insistence of Blake, the Order in Council transmitted to the Lieutenant-Governors on July 17, 1869, could have no further application in so far as it related to that paragraph.

By 1926 the possibility of Imperial control of provincial legislation by means of the power of reservation had been so well forgotten that no mention was made of it at the Imperial Conference of that year and those that followed. The situation, however, appears to be covered by the conventions that the Governor General is no longer the representative of Her Majesty's Government in Great Britain and that the Governor General now occupies the same position in a Dominion as the Queen does in England. The British authorities could not without violating these conventions advise the Governor General as to the manner in which a Lieutenant-Governor is to exercise his powers. In addition, the Imperial Parliament has now, by the British North America (No. 2) Act, 1949, given the Federal Parliament the legal power to abolish any right that the British Government may have in this regard.

Another aspect of the question of responsibility for the exercise of the power of reservation should be noted. During the early days of Confederation, the Lieutenant-Governors sometimes reserved controversial bills relating to provincial matters on the advice of their provincial ministers or in their own discretion. The Federal Government has, however, always maintained that the Lieutenant-Governors should exercise this power in their capacity as Dominion officers and on instruction. This matter is closely connected to the actual exercise of the power and will be dealt with in somewhat more detail in the chapter on that subject.

(*o*) Dom. & Prov. Legis., p. 1011.

Chapter 5

THE EXERCISE OF THE POWER OF DISALLOWANCE

First Period: 1867-1881

As we have seen, the Governor General in Council has, in exercising the power of disallowance, been guided by the advice of the Minister of Justice. It is to the reports of the latter upon this subject, then, that we must turn in order to ascertain the occasions that have justified the annulment of provincial statutes (*a*).

These reports furnish instances of four main grounds upon which such statutes have been disallowed, namely:

(1) as being invalid because beyond the legislative sphere assigned to the provinces or in conflict with validly enacted Dominion or Imperial Legislation;

(2) as conflicting with Dominion policies or interests;

(3) as conflicting with Imperial policies or interests;

(4) as being contrary to sound principles of legislation, an abuse of power, or unjust, unwise or otherwise inexpedient.

The first ground was the one principally relied upon during the early days after Confederation. Gradually it lost in importance until nowadays it is seldom the basis for disallowance unless a statute is otherwise objectionable. The second and most important of these reasons is the one that has most often been relied upon; it ensures that the Federal Government will not be hindered in performing its functions even where such interference results from valid provincial legislation. The third ground, in so far as it may be considered separate from the second, is now obsolete owing to the different structure of the Commonwealth today.

Around the fourth ground controversy has ever raged. Some Ministers of Justice have considered it a valid ground, believing that while great caution should be exercised in performing this function, the Federal Government has nevertheless the right and duty to review provincial statutes on their merits; others, on the other hand, contended that the power had been conferred solely for the purpose of maintaining the position of the Federal Government and ensuring that it could give effect to its policies. From the standpoint of whether the first or second of these views prevailed, the history of the power of disallowance may be divided into five fairly clear-cut periods, namely, (1) 1867 to 1881, (2) 1881 to 1896, (3) 1896 to 1911, (4) 1911 to 1924, and (5) 1924 to

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(*a*) The reports of the Ministers of Justice to the Governor in Council upon this matter have been collected in two volumes, "*Correspondence, Reports of the Ministers of Justice and Orders in Council upon the subject of Dominion and Provincial Legislation, 1867-1895*" by W. E. Hodgins (herein referred to as Dom. & Prov. Legis.), and "*Correspondence, Reports of the Minister of Justice and Orders in Council upon the subject of Provincial Legislation, 1896-1920*", Volume II, by Francis H. Gisborne and Arthur A. Fraser (herein referred to as Prov. Legis.); the corresponding documents since 1920 have not yet been published but the more important reports of the Ministers of Justice have been attached to the orders in council passed pursuant to these reports and are available to the public; others are on the files of the Department of Justice.

date. To each of these periods a chapter will be devoted. In these, little reference will be made to the power to reserve bills for the assent of the Governor General; the guiding principles relating to that power being different, it will be given separate attention.

Turning now to a consideration of the manner in which the power of disallowance was exercised in the first period following Confederation, we have seen that in his report of June 8, 1868, respecting the manner in which the power should be exercised, Sir John A. Macdonald set out the classes of Acts that should be considered from the standpoint of disallowance. These were those thought objectionable:

1. As being altogether illegal or unconstitutional;
2. As illegal or unconstitutional in part;
3. In cases of concurrent jurisdiction, as clashing with the legislation of the general parliament;
4. As affecting the interests of the Dominion generally...(b)

It is clear that in the first two classes Macdonald used the words "illegal or unconstitutional" in apposition. A perusal of his later reports indicates that he consistently used the word "unconstitutional" therein as meaning Acts beyond the competence of the local legislature (c), and it is difficult in this connection to attach any other meaning to the word "illegal". That Macdonald sometimes used the words in apposition is evident from one of his earliest reports as well as a speech that will be quoted elsewhere in this chapter (d). It is submitted, further, that had Macdonald meant unconstitutional in the sense of contrary to constitutional principles or usages, he would have made this a separate class. Finally, when in 1881, he had occasion to recommend the disallowance of a statute on the grounds that it violated private rights and natural justice, it was the fourth and not the first or second class upon which he relied, even though, as will be seen, he had up to that time interpreted "the interests of the Dominion" as the interests of the Dominion in its own sphere.

An Act falling in the first class provides the first example of disallowance of provincial legislation by the Governor General. It is an Act of the Nova Scotia legislature, disallowed on the 29th day of August, 1869, on the ground that it was "objectionable inasmuch as it deals with criminal law, which appertains to the Parliament of the Dominion" (e). The second of Macdonald's reasons came into play the following year when the Ontario Supply Bill of 1869 was disallowed because one section provided for the payment of a sum of money to Superior Court Judges in addition to the salary they received from the Dominion Parliament, a matter he believed to be within the sole competence of Parliament (f).

Of Macdonald's fourth class, "An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia" provides the first example. The Act was disallowed in 1875 on the recommendation of the then Minister of Justice, the Hon. Telesphore Fournier, on the ground that it was objectionable "as tending to deal with lands which are assumed to be the absolute property of the province, an assumption which completely ignores, as applicable to the Indians of British Columbia, the honour

(b) Dom. & Prov. Legis., p. 62.
(c) *Ibid*, pp. 9-10, 250, 253, 256, 472 and 662.
(d) *Ibid*, p. 94; for the speech, see *infra* p. 39.
(e) *Ibid*, p. 473.
(f) *Ibid*, pp. 93-4.

and good faith with which the Crown has, in all other cases... dealt with... various Indian tribes" (*g*). The care of Indians had been entrusted to the Federal Government, and their rights to lands in the province had been preserved by section 109 of the British North America Act. The following year a Manitoba statute in amendment of The Half-Breed Land Grant Protection Act was also disallowed, this time on the recommendation of the Honourable Edward Blake, because it conflicted with Dominion policy (*h*).

In all, twenty-seven Acts were disallowed during this period. All those not specially mentioned herein were considered *ultra vires* the provincial legislature, a number of which also affected Dominion interests or policies. In addition, many provisions believed to be *ultra vires* were amended upon a threat of disallowance. Where, however, the Ministers of Justice considered an *ultra vires* provision useful or beneficial or of little importance, they simply brought it to the attention of the local legislature. A similar course was followed where a statute was only of doubtful validity.

In order to understand the difference between this period and the one that followed, it is instructive to consider why certain Acts were not disallowed. In this period Ministers of Justice refused to advise the annulment of Acts within the competence of the legislatures and not conflicting with Dominion policies even when they strongly disapproved of them. John A. Macdonald began this trend and subsequent Ministers of Justice followed the same policy until 1881. In 1872 Macdonald reported on a number of Ontario statutes that had been petitioned against by persons prejudicially affected by them. Without in any way discussing the grounds upon which the petitioners prayed for the disallowance of the Acts, Macdonald recommended that as the Acts were clearly within the competence of the local legislature they should be left to their operation (*i*). Of these may be mentioned an Act respecting the will of the Honourable George J. Goodhue. This gentleman had, by testamentary disposition, left to his children a life estate in his property with a reversionary interest to his grandchildren. The children agreed to make a different distribution of the estate whereby they would receive it all absolutely, the grandchildren getting nothing. They thereupon applied to the Ontario Legislature to ratify this agreement by statute without the consent of some of the parties directly interested. Failing in their attempt to persuade the legislature not to pass the Act, the trustees of the will petitioned the Governor General to disallow it but were unsuccessful, Macdonald recommending that the Act be left to its operation "as it is within the competence of the provincial legislature". Numerous other Acts, prejudicial to vested rights, were left to their operation by Sir John on the ground that they were within the competence of the provincial legislature (*j*). The most dramatic of these cases was one relating to a New Brunswick statute of 1871, "An Act relating to Common Schools", that compelled Roman Catholics in New Brunswick to contribute to a

(*g*) *Ibid*, p. 1028.
(*h*) *Ibid*, p. 804-5.
(*i*) *Ibid*, pp. 100-1.
(*j*) See the Speech of M. C. Cameron in the debate upon the Streams Act of Ontario, Debates of the House of Commons, 1882, pp. 876 et seq.; and the memorandum of Ontario upon the same Act, Dom. & Prov. Legis., pp. 179-185.

system of education of which they could not conscientiously avail themselves. The bill affected a very large number of people and many strong petitions were addressed to the Governor General to disallow it. In his report Sir John A. Macdonald thus set out his reasons for refusing to recommend the disallowance of the measure:

> Now the provincial legislatures have exclusive powers to make laws in relation to education, subject to the provisions of the 93rd clause of the British North America Act. Those provisions apply exclusively to the denominational, separate or dissentient schools, they do not, in any way, affect or lessen the power of such provincial legislatures to pass laws respecting the general educational system of the province.
>
> . . . . . .
>
> It may be that the Act in question may operate unfavourably on the Catholics or on other religious denominations, and if so, it is for such religious bodies to appeal to the provincial legislature, which has the sole power to grant redress.
>
> As, therefore, the Act applies to the whole school system of New Brunswick, and is not specially applicable to denominational schools, the Governor General, has, in the opinion of the undersigned, no right to intervened (*k*).

Shortly afterwards, a resolution was moved in the House of Commons that the Act be disallowed. This motion was opposed by the Ministry and was not successful, but the House indicated its strong disapproval of the measure by passing another resolution, to which reference has already been made in the preceding chapter, regretting the passage of the Act and expressing the hope that it would be modified, and, in addition, suggesting that the opinion of the law officers of the Crown in England, and if possible that of the Judicial Committee of the Privy Council, should be obtained to determine whether the Act was not *ultra vires* the legislature. Speaking upon the resolution to disallow, Sir John is reported as saying:

> ...the sole matter which presented itself to the Government was whether according to "the British North America Act, 1867", the Legislature of New Brunswick had exceeded its powers... As the officer primarily responsible on such subjects, he could only say that he had taken uniform care to interfere in no way whatever with any Act passed by any of the Provincial Legislatures if they were within the scope of their jurisdiction. There were only two cases in his opinion in which the Government of the Dominion was justified in advising the disallowance of a Local Act—first, if the Act was unconstitutional, and there had been an excess of jurisdiction—and second, if it was injurious to the interests of the whole Dominion. In the case of measures not coming within either of those categories, the Government would be unwarranted in interfering with local legislation. In the present case there was not a doubt that the New Brunswick Legislature had acted within its jurisdiction, and that the Act was constitutionally legal and could not be impugned on that ground... As to the second ground which he had mentioned, on which he considered the Dominion Government could interfere, it could not be held that the Act in any way prejudicially affected the whole Dominion, because it was a law settling a Common School system for the Province of New Brunswick alone... If the legislation was bad, if it bore on them (the Roman Catholics of New Brunswick) unjustly, that injustice pressed at the polls would force the Legislature to do justice... The Government of the Dominion could not act and they would have been guilty of a violent wrench of the Constitution if because they might hold a different opinion, they should set up their own judgment against the solemn decision of a Province in a matter entirely within the control of that Province (*l*).

(*k*) Dom. & Prov. Legis., pp. 662-3.
(*l*) Parliamentary Debates, Dominion of Canada, 1872, Cols. 199-200.

The New Brunswick authorities strongly protested against this intervention of the Federal Government in a matter of provincial concern (*m*), and, ignoring the wishes of the House of Commons, the Legislature passed a number of amendments to strengthen the provisions of the 1871 statute. These amendments were brought to the attention of the House the following year, when it was moved that they be disallowed. The Prime Minister, in opposing the resolution, set out his views on the subject in a speech of great length, pertinent extracts from which are as follows:

> ...if a resolution like this was adopted formally and solemnly by the Dominion Legislature, he must say... that a federal union of the Provinces was at an end; that the legislative union had commenced, and the whole real power and authority of all the powers of government had been transferred from the Provincial Legislatures to the Dominion Parliament. They could not draw the line. It might be, and he did not hesitate to say, that from his own point of view it was so in this case, that the minority... suffered a wrong by this legislation, but there might be wrongs not only in questions of education or religion, but in questions of finance, of civil liberty, and in questions of every possible kind. And if the ultimate power of decision as to what is right and what was wrong was to be vested in this Parliament, where was... the benefit or advantage of all our paraphernalia of Provincial Governments and Provincial Legislatures. If they were... to order the Governor-General... to disallow such bills as they thought the Local Legislature ought not to have passed, they would have wiped off the slate as with a wet sponge, the influences and authority of the Local Governments and Legislatures and have centred it all in the Canadian Parliament. Was this House... prepared to assume that new responsibility and to alter in spirit the constitution? It might be that they might keep up the sham of Provincial Legislatures, but what would they be but sham, if at any time the members of the other Provinces disagreeing with the policy deliberately adopted by the Legislature of any one Province could alter that policy?... They (the Provinces) had their rights, and the question was not whether this House thought a Local Legislature was right or wrong. But the whole question for this House to consider, whenever such a question as this was brought up, was that they should say at once that they had no right to intefere so long as the different Provincial Legislatures acted within the bounds of the authority which the constitution gave them... If this House undertook the great responsibility of interfering with the local laws, they must be prepared to discuss the justice or injustice of every law passed by every Provincial Legislature... (*n*)

The resolution was passed, however, despite the administration's opposition to it. But the Act was not disallowed; Macdonald chose instead the course of advising the Governor General to seek instructions upon the matter from the Colonial Office—a step that resulted in the controversy between the Federal and Imperial authorities already discussed in the preceding chapter.

It is not without interest that a number of other Fathers of Confederation expressed their agreement with Macdonald that the Federal Government had no right to intervene in this matter. Among these were

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(*m*) Dom. & Prov. Legis., pp. 684-5.

(*n*) Parliamentary Debates, Canada, 1873, consisting of clippings from the *Ottawa Times* and *Toronto Mail*, pp. 177-8; it may be found in the Parliamentary Library. The above excerpts are quoted by Blake in his speech on the Ontario Streams Act, Debates of the House of Commons, 1882, pp. 918-9.

Tilley, Langevin, Colonel J. H. Gray of New Brunswick and Cartier, the latter thus reversing the position he had taken during the Confederation debates (*o*).

When the Mackenzie administration came into power, it followed the path thus trodden by Sir John A. Macdonald, even though Mackenzie and his first two Ministers of Justice, Dorion and Fournier, had voted for the disallowance of the Schools Acts. When, in 1875, a resolution was moved in the House of Commons that the British North America Act be amended to empower the Federal Government to change the statutes without the consent of New Brunswick, Mackenzie took the opportunity of explaining why he had voted for the disallowance of the New Brunswick Acts. He had felt, he said, that the Acts ran counter to the provisions of section 93 of the British North America Act, otherwise, he would not have voted in the way he did. He went on:

> I took occasion at that time to say if the decision of the Supreme Court to which the matter would be referred should be to the effect that the legislation was within the competence of that Legislature, that then I should advocate submission to the law and a resort to that peaceful agitation, which in all free countries produces ultimately, sooner or later, the desired result in the case of all who have particular hardships to be remedied (*p*).

Little appears in Dorion's and Fournier's reports to indicate their views on disallowance for injustice, the statutes upon which they commented being either *ultra vires* or offending against Dominion policies. The next Minister of Justice, the Honourable Edward Blake, had, however, more to say about the matter. Perhaps the best statement of his views on the question is in a speech delivered in 1886, when he was no longer Minister of Justice, in which he asserted:

> I maintain that under our Constitution, properly interpreted, the provinces have the uncontrollable power of passing laws, valid and binding laws, upon all those matters which are exclusively within their competence, except, perhaps, in the rare cases in which such legislation may be shown substantially to affect Dominion interests. If you are to admit the view that the Dominion Cabinet may veto and destroy your legislation on purely local questions, you make your local legislatures a sham, and you had better openly, honestly and above-board do that which the other system aims at, viz.: create one central legislative power and let the Parliament at Ottawa do all the business... I inquire only as to this: is the law passed by the local legislature within the exclusive competence of that legislature and not materially affecting Dominion interests? If so, the Ottawa Cabinet have no right to touch it. I admit—and I rejoice—that there is an appeal from the power that made that law, but that appeal is from the legislature which passed the law to the people who elected that legislature and who can elect another to their minds (*q*).

His reports bear out this view. Thus, in 1876, when he was considering a Quebec statute that removed a man from an office to which he had been appointed by the Imperial government in lieu of being given a retiring allowance to which he had been entitled, Blake asserted that, although the statute did not provide for compensation and that in general this

(*o*) Parliamentary Debates, Dominion of Canada, 1872, cols. 201-2, 706-7 (Cartier), 203 (Gray); 708 (Langevin); Parliamentary Debates, Canada, 1873, pp. 178, 762 (Langevin) and 179 (Tilley).

(*p*) Debates of the House of Commons, 1875, p. 609.

(*q*) Quoted by Biggar, *op. cit.*, Vol. I, pp. 343-4.

should be done in a case of this nature, nevertheless "a violation of this general rule, in matters purely local, would not, by itself, furnish ground for disallowance" (*r*). In that case he considered the matter because it involved the honour and good faith of the Crown in right of Canada and the Empire. Again, in 1875, reporting upon an Ontario statute respecting the union of certain Presbyterian churches that had been petitioned against, he affirmed:

> The undersigned does not conceive that he is called upon to express an opinion upon the allegations of the petition as to the injustice alleged to be effected by the Act. This was a matter for the local legislature (*s*).

Some of Blake's statements seem at variance with the principles above enunciated, but on closer examination such remarks are clearly distinguishable. Thus in 1876, when reporting on "An Act to incorporate the Musical Band of the Village of Lauzon" that gave an association power to pass a by-law under which a person might be imprisoned for a period of thirty days, he advised that the attention of the Lieutenant-Governor should be called to the Act with a view to its amendment before the time arrived within which it could be disallowed. But in this connection it should be noted that Blake questioned the authority of the legislatures to delegate powers to bodies other than municipalities (*t*). Again in 1876, dealing with a Quebec statute that had been petitioned against, though he refused to interfere on the ground that it was *ultra vires* because the question was before the Courts, he nevertheless suggested that the provincial authorities should consider the amendment of an especially objectionable provision that imposed a retrospective obligation upon insurance companies (*u*). In explaining his action in regard to this statute some years later in the House of Commons, Blake pointed out that he had considered the Act *ultra vires* and that it was subsequently so found by the courts, and he added further:

> There is no statement that the Act would be disallowed if no such amendments were made. I have never heard that such amendments were made, and yet the Bill was not disallowed (*v*).

Similarly, the next Minister of Justice, the Hon. Rodolphe Laflamme, made statements that indicate that he did not consider it proper to annul a statute by reason only that he considered its provisions unjust. But that he was willing in such a case to bring it to the attention of the provincial authorities can be seen from his report upon "The Public School Act, 1877" of Prince Edward Island in which he reported as follows:

> ...however arbitrary or unjust the mode of enforcing it may appear, it would not seem proper for the federal authority to attempt to interfere with the details, or the accessories of a measure of the local legislature, the principles and objects of which are entirely within their province.
>
> Inasmuch, however, as the provisions first referred to, which enable the trustees to levy the tax at their discretion, seem to depart in a measure from the well established principle that taxation should be certain, and so far as possible equally distributed, I recommend that the attention of the

(*r*) Dom. & Prov. Legis., p. 274.
(*s*) *Ibid.* p. 133; see also pp. 712 and 815.
(*t*) *Ibid*, pp. 285, 290.
(*u*) *Ibid*, pp. 287-9.
(*v*) Debates of the House of Commons, 1882, p. 916; in that speech (beginning at p. 968) Blake disposes of a number of apparent inconsistencies.

> Lieutenant-Governor be called to such provisions, with a suggestion that they should be amended to meet the objections mentioned; bu for the reasons above set out, I recommend that the Act itself be left to its operation (*w*).

However, a few remarks of this Minister of Justice appear to run counter to the established practice during this period. Thus in 1877 he criticized on their merits certain provisions of a New Brunswick statute relating to municipalities (*x*). He, however, also thought the provisions *ultra vires*. The same year, in reviewing a British Columbia statute, "An Act to encourage the mining of Gold Bearing Quartz", he advised that the attention of the Lieutenant-Governor be called to section 4 thereof, with a view to its amendment at the next session of the legislature because it "would seem to be objectionable, as it may be an interference with vested rights of private individuals, without providing... compensation... therefore" (*y*). The action in regard to this latter statute appears to be definitely contrary to the trend of this period. It may have been only a suggestion, however, for it should be noted that in reference to three other statutes to which he took objection in the same report (and which were subsequently disallowed), he makes it quite plain that if the Acts were not amended, they would be annulled, whereas in this case no such threat is made. Further, any other view seems inconsistent with his own remarks made about the same time, and, more important, those of the Prime Minister in the House of Commons a few years earlier.

Finally, we have the Honourable James McDonald who was appointed Minister of Justice when Sir John A. Macdonald was re-elected in 1878. During his first year as Minister of Justice, he said in respect of "An Act relating to Crown Lands in British Columbia", the provisions of which he considered of a "startling nature", that

> If the whole subject matter of this Act were within the exclusive legislative control of the British Columbia legislature, I would feel some difficulty in recommending that the Act be disallowed, merely because its provisions did not accord with my views of justice.
>
> I recognize fully the importance of allowing the local legislature to be the judges of the wisdom and expediency of any Act falling within their exclusive legislative authority (*z*).

In the same report he voiced the same view when discussing "An Act to amend the Assessment Act, 1876". Again in 1880, dealing with "An Act to amend the 'Sumas Dyking Act, 1878' ", he affirmed:

> The disallowance of this Act was prayed for by Mr. E. L. Derby, on the ground that it was an interference with his rights. It is not necessary to pass any opinion upon the fairness or unfairness of the provisions of the statute, because, as I think, it is clearly within the legislative authority of the provincial legislature, and as no Dominion or Imperial interests are involved, it should be left to its operation. I recommend accordingly (*aa*).

It is important to note at this stage that while Acts were not disallowed as being unjust, unwise or impolitic during this period, the assent of the Governor General was refused to a number of reserved bills for these reasons. Different considerations apply to these, however, and this matter will be discussed in the next chapter.

(*w*) Dom. & Prov. Legis., p. 1197; see also p. 1198.
(*x*) *Ibid.* p. 717.
(*y*) *Ibid*, p. 1048.
(*z*) *Ibid*, p. 1066.
(*aa*) *Ibid*, p. 1077.

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Chapter 6

THE EXERCISE OF THE POWER OF RESERVATION AND THE GIVING AND WITHHOLDING OF ASSENT TO RESERVED BILLS

Because the power of reserving provincial bills was exercised far more frequently during the early years after Confederation than has been the case in this century, it seems appropriate to deal with the matter at this time. The exercise of this power involves the intervention of the Governor General in Council at two stages, in issuing instructions to the Lieutenant-Governors, and in giving or withholding assent to bills actually reserved. As to the first, we have already discussed the instructions given to the Lieutenant-Governors respecting the procedure to be followed by them in transmitting bills to the Governor General, and we need only concern ourselves here with the instructions respecting the occasions when bills should be reserved. Nothing on this aspect of the matter has ever been inserted in the formal instructions accompanying the commissions of Lieutenant-Governors, but the Lieutenant-Governors have, nevertheless, been instructed from time to time as to the manner in which they should perform this function.

A statement of a general nature respecting the contents of these instructions may be useful. The first point to note is that they advise Lieutenant-Governors not to exercise the power of reservation on the advice of their ministers; they should exercise this power in their capacity as Dominion officers and under instructions from the Governor General. As early as 1873 the Federal authorities instructed the Lieutenant-Governor of Ontario not to reserve bills relating solely to matters of provincial concern, and this principle was repeated on many occasions to other Lieutenant-Governors. On the other hand, during the first few years after Confederation, the Federal authorities considered it proper for a Lieutenant-Governor to reserve without instructions bills that he believed conflicted with Dominion or Imperial interests or were *ultra vires*. Subsequently, however, they advised that only cases of extreme necessity would warrant a Lieutenant-Governor's reserving a bill without instructions, and such necessity, they asserted, could seldom if ever arise.

Coming now to a more detailed account of these instructions, the earliest indication given to the Lieutenant-Governors of the attitude of the Federal Government towards the power of reservation was in 1869. In that year, as we have seen in a previous chapter, the Secretary of State for the Colonies addressed a letter to the Governor General instructing him not only to refuse his assent to reserved bills from the provinces relating to matters falling within the classes listed in the seventh paragraph of the Royal instructions but also to instruct the Lieutenant-Governors to reserve all such bills. In addition, the letter also instructed the Governor General not to assent to reserved bills that he considered illegal or "gravely unconstitutional" though "not of doubtful legality", even though he was advised to do so by his ministers. The part of the letter containing these instructions was transmitted, pursuant to an

Order in Council of July 17, 1869, to the Lieutenant-Governors "for their information and guidance" (*a*). Two points must be made here. First, the idea that a bill might properly be reserved if, though legal, it was gravely unconstitutional was British, not Canadian, and it was never again mentioned in instructions to the Lieutenant-Governors. Secondly, when in 1878 the seventh paragraph was removed from the Royal instructions, the Lieutenant-Governors would automatically cease to be guided by it.

The chief means used by the Federal Government in instructing a Lieutenant-Governor as to the manner in which he should exercise the power of reservation was the transmitting to him of the reports of the Minister of Justice on bills reserved by the Lieutenant-Governor. These reports soon made it clear that bills should not be reserved unless they conflicted with the instructions of the Lieutenant-Governor or with his duty as an officer of the Federal Government, or were *ultra vires*. Dealing with two reserved bills to establish Orange associations in Ontario in 1873, Sir John A. Macdonald reported in part as follows:

> That these Acts purport to incorporate two provincial associations.
>
> That the only object of these associations, appearing on the face of the Acts, is the holding of property, real and personal.
>
> That this being a provincial object, the Acts are within the competence and jurisdiction of the provincial legislature.
>
> Such being the case, in the opinion of the undersigned, the Lieutenant-Governor of Ontario ought not to have reserved these Acts for your Excellency's assent, but should have given his assent to them as Lieutenant-Governor.
>
> * * * * *
>
> ...in any province the Lieutenant-Governor should reserve a bill in his capacity as an officer of the Dominion, and under instructions from the Governor General.
>
> The ministers... of the Lieutenant-Governor are... bound to oppose in the legislature, measures of which they disapprove, and if, notwithstanding, such a measure be carried, the ministry should either resign, or accept the decision of the legislature, and advise the passage of the bill. It then rests with the... Lieutenant-Governor... to consider whether the Act conflicts with his instructions or his duty as... a Dominion officer,—and if it does so conflict, he is bound to reserve it, whatever the advice tendered to him may be; but if not he will doubtless feel it his duty to give his assent, in accordance with advice to that effect, which it was the duty of his ministers to give.
>
> With respect to the present measures, the undersigned is of opinion that the Lieutenant-Governor ought not to have reserved them for your Excellency's assent, as he had no instructions from the Governor General in any way affecting these bills. They are entirely within the competence of the Ontario legislature, and if he had sought advice from his legal adviser, the Attorney General of Ontario, on the question of competence, he would have undoubtedly received his opinion that the Acts were within the jurisdiction of the provincial legislature (*b*).

This attitude of Macdonald can also be perceived from a report of 1871 upon a Manitoba bill respecting land surveyors that had been reserved because the Lieutenant-Governor considered it inexpedient. While he agreed that there was great force in the arguments advanced by the Lieutenant-Governor, Sir John nevertheless pointed out that "This... is for the consideration of the provincial legislature" (*c*).

(*a*) Can. Sess. Pap. 1870 (No. 35), pp. 25-7.
(*b*) Dom. & Prov. Legis., pp. 104-5.
(*c*) *Ibid*, p. 772.

Subsequent Ministers of Justice followed the policy thus begun by Macdonald of advising that bills solely concerned with provincial matters should not be reserved. Though little appears in his reports, Edward Blake made it clear in the House of Commons in 1882 that he approved of this policy. This Minister's views respecting the course that should be followed not only by the Lieutenant-Governors but also by their ministers deserve quotation; he said:

> The constitutional rule with reference to reserving Bills and of dealing with Bills which may be objected to by Ministers or Governors is clear and well settled under the principles of the British Constitution, and applicable in its broadest sense and fullest extent to the action of the Provincial Legislatures. If a Governor disapproves of a bill it is his duty to settle that matter with his Ministers while the Bill is yet before the Assembly. It is his duty to say "Gentlemen I disapprove of your proposed measure, and I will not allow that Bill to become a completed Act". If he chooses to take the responsibility of making the quarrel between himself and his Ministers upon that subject he has right to do so; but when he permits the measure to pass through the Local Legislature and it comes before him for assent, he has no right to refuse assent. He has no right to turn what would be a conflict between himself and his Ministers into a much more serious thing, a quarrel between himself and the Assembly by declining to assent to a Bill after it has been passed. So again with reference to the Ministers to advise reservation. I am, of course, speaking generally. There may be exceptional cases which we have never yet defined, as almost all rules have their exceptions, but speaking generally the Ministers have no right whatever to permit a measure to which they are opposed to pass through the Legislature and afterwards advise exercise of the power of reservation. Their duty is to make the quarrel one between themselves and the Legislature, and to decide at once whether their views are to prevail on that body or not (*d*).

In 1879, the Honourable James McDonald, then Minister of Justice, quoted with approval Sir John's report of 1873 when a bill of Prince Edward Island dealing with Orange Lodges in that province was reserved (*e*).

But while in the reports of the Ministers of Justice the Lieutenant-Governors were often advised not to reserve bills affecting provincial matters only, the Federal Government appears to have considered it proper for Lieutenant-Governors to reserve bills that they considered *ultra vires* or in conflict with Dominion or Imperial policies or interests. Subsequently, however, this policy was somewhat altered. The terms of the new policy may be found in a Minute of Council of November 29, 1882, a copy of which was transmitted to the Lieutenant-Governor of each province. The Minute relates that a number of Lieutenant-Governors had reserved bills on the advice of their ministers, that the right of reserving bills for His Excellency's assent was given for the protection of Federal interests, and adds:

> The Lieutenant Governor is not warranted in reserving any measure for the assent of the Governor General on the advice of his ministers. He should do so in his capacity of a Dominion officer only, and on instructions from the Governor General. It is only in a case of extreme necessity that a Lieutenant Governor should without such instructions exercise his discretion as a Dominion officer in reserving a bill. In fact, with facility of communication between the Dominion and provincial governments such a necessity can seldom if ever arise (*f*).

(*d*) Debates of the House of Commons, 1882, p. 910.
(*e*) Dom. & Prov. Legis., p. 1203.
(*f*) *Ibid*, p. 78.

From that time on the attitude of the Federal Government has been that, unless it gives other instructions, legislation should be completed before being transmitted to the Governor General for consideration. But even after this Minute of Council had issued, Ministers of Justice found it necessary from time to time to draw attention to this policy as well as to the older one that bills dealing solely with matters of provincial concern should not be reserved. Thus, in 1893, Sir John Thompson, in dealing with a reserved bill of Prince Edward Island respecting matters entirely of provincial concern, referred to Sir John A. Macdonald's report of 1873 and that of James McDonald of 1879 as laying down the correct procedure to be followed by Lieutenant-Governors when bills dealing solely with provincial matters were presented for their assent (*g*). And two years later Sir Charles Hibbert Tupper drew the attention of the Lieutenant-Governor of New Brunswick to the Minute in Council of 1882 (*h*). As late as 1924, reporting upon the Church Union Bill of Prince Edward Island,—a bill to which the Lieutenant-Governor had refused, not reserved, assent—the Federal Government re-asserted its policy that unless extreme necessity otherwise requires, a Lieutenant-Governor should never reserve a bill without instruction (*i*).

Finally, some bills have been reserved under instructions of the Governor General to reserve assent to certain classes of bills. Thus, two bills of British Columbia in amendment of the "Vancouver Island Settlers' Rights Act, 1904" were reserved on instruction (*j*). Such instructions were given in that case because, as has been seen in an earlier chapter, disallowance was found not entirely effective; it could not affect completely constituted private rights based on transactions entirely past and closed.

Consideration must now be given to the principles guiding the Ministers of Justice in advising the Governor General as to the course he should take in dealing with bills coming up for consideration after having been reserved. Somewhat different principles appear to have been applied following the Federal Government's statement of policy in 1882 respecting the occasions when provincial bills might properly be reserved than had been applied before that time, and a study will first be made of this matter from the time of Confederation until that year. During that period it was not uncommon for Lieutenant-Governors to reserve assent to controversial bills that were totally of provincial concern, notwithstanding the fact that the Federal Government had, on a number of occasions, asserted that this should be done. To such bills the Ministers of Justice did not—except in one case to be discussed later—recommend assent, whether they considered them expedient or otherwise, because the Federal Government did not consider it proper to assume responsibility for matters of purely provincial concern. Nor would assent be given to a bill that the Minister of Justice considered unwise, unjust or inexpedient, whether or not it had been properly reserved, for the Governor General could not be expected to sanction a bill of which his advisers disapproved. On the other hand, where a bill was properly reserved, i.e., because the

(*g*) *Ibid*, p. 1225.
(*h*) *Ibid*, p. 763.
(*i*) P.C. 752, dated the 5th day of May, 1924.
(*j*) Prov. Legis., pp. 758-760.

Lieutenant-Governor considered it *ultra vires* or in conflict with Federal policies or interests, and the Minister considered it within the competence of the legislature and not in conflict with such policies or interests and not otherwise objectionable, he would recommend assent. The conflict with Federal policies or interests or the doubt as to the validity of a bill did not, to warrant withholding assent, have to be of such seriousness as would have resulted in its disallowance if it had come up for review as a completed Act. It was enough that there was some doubt as to its validity or possible conflict with Federal policies or interests. The sanctioning of such a bill, it was thought, might lead to embarrassment or inconvenience to the Federal Government.

An examination must now be made of the precedents in support of the above conclusions. As we have seen, unlike his action respecting the disallowance of statutes, no report to Council was ever prepared by Sir John A. Macdonald setting out the principles upon which the Governor General should be guided in giving or withholding assent to reserved bills. His views can, however, be extracted from his reports. From a close examination of these, it would appear that the only bills to which he would recommend assent were those that had been reserved because they were believed to be *ultra vires* or in conflict with Federal or Imperial interests or policies that he found valid and not in conflict with such interests or policies and not otherwise objectionable. The first of the four bills to which he recommended assent was one of 1869 entitled "An Act relating to the appointment of Justices of the Peace in the Several Counties of the Province". He advised this course in respect of the bill on the ground "that it is within the jurisdiction of the legislature of New Brunswick, and that it is unobjectionable" (*k*). In the same year, Sir John advised that he was of opinion that another New Brunswick bill, one relating to marriage licences, was beyond the competence of the provincial legislature and that the Governor General should not give his assent to it. As the matter was of the greatest importance, he suggested that it be submitted to the law officers of the Crown for consideration, and on receiving their opinion that the bill was within provincial legislative competence he advised that assent be given to it (*l*). So too, in 1871, he said in respect of a bill that had been reserved as possibly trenching on Federal rights that he, "having carefully examined the provisions of the said bill, is of opinion that it is within the jurisdiction of the Legislature of New Brunswick, and as no rights of the Crown are affected by it, he recommends that your Excellency do give your assent thereto" (*m*). Finally, in 1872 a British Columbia bill was reserved because the Lieutenant-Governor believed it might be in contravention of the Royal instructions to Governors and section 91 (24) of the British North America Act. Having decided that this was not the case, Macdonald recommended that assent be given to it (*n*).

On the other hand, Macdonald never recommended assent to bills that had been reserved for a reason that properly was a matter for the consideration of the provincial legislature, whether or not he approved of them, and in some cases he did not even report upon them. His views respecting the manner in which bills that should not have been reserved should be

(*k*) Dom. & Prov. Legis., p. 650.
(*l*) *Ibid*, pp. 655, 658.
(*m*) *Ibid*, p. 661.
(*n*) *Ibid*, pp. 1011-2.

dealt with can best be demonstrated by examining his action in respect of the Orange bills of Ontario already mentioned. He did not express approval or disapproval of the bills. He failed to recommend assent to them simply because they should not have been reserved as they dealt with matters of provincial concern only, and in such matters he did not wish to intervene. This appears from the concluding passage of his report where he says:

> If the Acts should again be passed, the Lieutenant-Governor should consider himself bound to deal with them at once, and not ask your Excellency to intervene in matters of provincial concern, and solely and entirely within the jurisdiction and competence of the legislature of the province (*o*).

Most of the reserved bills dealt with by Macdonald were reserved for reasons that he considered valid, namely, that they were suspected of being *ultra vires* or in conflict with Federal policies. In most cases he agreed with the conclusions of the Lieutenant-Governor and therefore did not recommend assent to the bills. But even when he disagreed with the views of the Lieutenant-Governor on these points, he would not assent to a bill if he found it objectionable for some other reason. For instance, in 1872, he advised that the Governor General refuse his assent to a bill entitled "An Act to incorporate the Assiniboine and Red River Navigation Company" because he believed that one of the clauses of the bill did not express the intention of the shareholders of the proposed company (*p*). Sir John also made it clear that he would not recommend assent to an unjust bill, though properly reserved as suspected of being *ultra vires* or in conflict with Dominion policies. Thus, in 1871 assent was refused to a Manitoba bill not only because it conflicted with Dominion railway policy but also because it failed to provide compensation for infringements upon vested rights (*q*). While, as we have seen, he attempted not to interfere with purely provincial matters by recommending that disallowance should not be exercised in respect of legislation dealing with such matters, it is understandable that he was not prepared to take any active step to give validity to any reserved bill that he considered unwise or inexpedient.

The first Liberal Minister of Justice after Confederation, the Honourable A. A. Dorion, said even less than Macdonald had regarding the guiding principles respecting reserved bills but his practice appears to have been the same. He too recommended that assent be given to bills reserved because they were believed to be *ultra vires* or contrary to Dominion policy, but which in fact were not (*r*). On the other hand, he advised that assent be withheld from a bill that interfered with the survey of public lands, which were then vested in Her Majesty in right of Canada (*s*). Dorion's attitude towards bills that should not have been reserved also appears to have been similar to Macdonald's. This is evidenced by his action in 1874 in respect of six Manitoba bills. Five had been reserved because they were considered *ultra vires* or at variance with Dominion policy, and upon these he reported at some length. The

(*o*) *Ibid*, p. 105.
(*p*) *Ibid*, p. 772.
(*q*) *Ibid*, p. 769-70.
(*r*) *Ibid*, pp. 707, 777 and 779.
(*s*) *Ibid*, p. 777.

remaining bill, "An Act respecting the Study and Practice of Law", was reserved because the Lieutenant-Governor questioned whether the bar of the province was sufficiently settled and stable to justify the control of admission to the bar by the few practitioners there; no report was made upon it (*t*).

Subject to one exceptional case that will be discussed later, the same rules seem to have been followed by subsequent Ministers of Justice, though with very little comment on the principles that guided them. Blake, however, does have something to say. In 1876, in dealing with "An Act to incorporate the Manitoba Investment Association (Limited)", he indicated quite clearly that the course to be followed in refusing assent to reserved bills differed from that to be followed when considering whether or not the power of disallowance should be exercised. The bill in question was of doubtful validity but it involved questions of great difficulty and earlier Ministers of Justice had recommended that similar statutes be left to their operation. Blake had this to say:

> ...upon the whole, therefore, the impression of the undersigned would have been (had this bill come before him as an Act, with a view to his decision whether it should be dissallowed or not) that it should be left to its operation, but this is not the question.
>
> The question is whether council should advise his Excellency to assent to this Act, which is a reserved bill.
>
> It appears to the undersigned that, as a general rule, the Lieutenant-Governor should himself act with the advice of ministers upon the question of assent.
>
> To this rule there will no doubt be, from time to time, exceptions, but the undersigned submits to council whether this bill comes within the exceptions. Upon the whole, considering the difficulties to which the undersigned has adverted, and the inconveniences which might result from the Governor in Council being called upon to give vitality to provincial legislation of this description, the undersigned recommends that no action be taken upon the bill in question (*u*).

Blake made his views even more explicit in 1882. In that year, he explained the difference between the principles involved in exercising the power of disallowance and those that should obtain in dealing with reserved bills. In his view, whenever the subject matter of a statute or bill was one of purely provincial concern, it should not be interfered with but should be left where it was; if a statute, it should not be disallowed; if a bill, it should not be given validity. Citing his report of 1876, above referred to, he said:

> There you will see that I thought, rightly or wrongly, that if that Bill had come before me as an Act it would have been my duty to advise that it should be left to its operation; while I did think that, coming before me as a Bill improperly reserved, it was my duty not to advise His Excellency to give it the vitality which would make it an Act. Now I think that nothing can be more obvious than that it would be the most dangerous thing in the world to hold any different view. We do not want Local Governments or Local Governors, or persons in any of the Provinces, to shuffle their responsibilities on to the shoulders of the Government here. We want these matters discussed in the Local Legislatures by the people who are responsible for their disposition... I lay down this as a general proposition that the conclusion not to assent to a reserved Bill is entirely different from the conclusion to disallow an Act which is completed (*v*).

(*t*) *Ibid*, pp. 775-9.
(*u*) *Ibid*, pp. 815-6.
(*v*) Debates of the House of Commons, 1882, p. 911.

When a bill was properly reserved, however, Blake, like his predecessors, would recommend assent on finding it unobjectionable. Thus, in 1876, he recommended that assent be given to a bill that had been reserved because it might interfere with Dominion interests on deciding that no such interests were prejudiced (*w*).

The Honourable James McDonald has also left us with his views regarding the principles to be followed in dealing with reserved bills. In 1878, this Minister of Justice refused to recommend assent to "An Act to incorporate the Provincial Grand Orange Lodge of Prince Edward Island", repeating at length the grounds advanced by Macdonald in 1873 (*x*). Again, in 1879, in reporting upon a Prince Edward Island bill that had been reserved on the ground that it "interferes with the prerogative of the sovereign as temporal head of the church...", he had this to say:

> The Lieutenant-Governor may have thought that it was an interference with Her Majesty's prerogative, and not within the legislative control of the provincial assembly, to disestablish the Church of England in the province. Except for this there would be no reason whatever for reserving the bill, and I would have recommended that the course usually adopted with reference to local bills, reserved for the signification of the Governor General's pleasure thereon, which should not have been reserved, should be followed in this case, namely, that no action should be taken thereon.
>
> But it is as well that no doubt should exist upon the matter. I think in this instance it would not be improper to recommend that the bill be assented to. I therefore recommend that the assent of his Excellency the Governor General be given to the bill.
>
> I recommend further that the Lieutenant-Governor be informed that, for the reason above mentioned, this case is looked upon as an exceptional one, and that it must not be regarded as a precedent with respect to other bills, entirely within the legislative authority of the provincial legislature, and in which no Dominion or Imperial interests are involved (*y*).

To the course taken by Ministers of Justice before 1882 in dealing with bills that should not have been reserved, one exception exists. In 1875, "The Land Purchase Act, 1874" was assented to by the Governor General though it dealt with matters that concerned only the provincial legislature (*z*). Blake was Minister of Justice at the time but the report was made by the Honourable Telesphore Fournier who, observing that the reason stated for refusing assent to a similar bill the previous year was that it contained unjust provisions, advised that the bill be assented to because these provisions had been removed. The exceptional nature of this action can be seen from the following remarks of Blake upon it in 1882:

> For my part I had nothing to do with this Prince Edward Island Bill. I knew nothing of it, until I saw it in the Journals; but of course, I had the technical responsibility of a member of the Government who remained in the Government after that Act came down to Parliament, and I do not shirk that in the slightest degree. But, in the conclusion, that the Bill should not have been given vitality to here, I for my part concurred, and the reason is because I thought it ought to have been completed in the Local Legislature (*aa*).

(*w*) Dom. & Prov. Legis., pp. 1179-80 and 1182-3.
(*x*) *Ibid*, pp. 1203-5.
(*y*) *Ibid*, pp. 1200-1.
(*z*) *Ibid*, p. 1161.
(*aa*) Debates of the House of Commons, 1882, p. 911.

Since 1882 fewer provincial bills have been reserved, and none appear to have received the assent of the Governor General. On some occasions the reasons established before 1882 for withholding assent were given, i.e., that the bill was *ultra vires* or in conflict with Dominion or Imperial policies or interests (*bb*) or that it should not have been reserved as being concerned solely with provincial matters (*cc*), but in addition, assent was sometimes withheld simply because the Minister felt that the bill should not have been reserved. This occurred even when the bill would, before 1882, have been considered properly reserved as being thought by the Lieutenant-Governor to be *ultra vires* or in conflict with Dominion policies or interests (*dd*). Since it is difficult under the policy enunciated in 1882 to imagine a case where a bill would properly be reserved except on instruction, it is unlikely that many reserved bills will be assented to by the Governor General in future if the practice is followed of not assenting to bills that should not have been reserved.

In all, at least sixty-nine bills have been reserved for the pleasure of the Governor General, thirteen of which have been assented to by him (*ee*). The vast majority of these were reserved before the turn of this century but the power is by no means constitutionally obsolete. As recently as 1937, it was exercised by the Lieutenant-Governor of Alberta in respect of three bills of that province (*ff*). This action, it is true, was taken without instruction (*gg*), but if a case ever again arose—as occured in respect of the Vancouver Island Settlers' Rights Acts—where the power of disallowance was not totally effective to protect Federal interests or policies, there is no reason to believe the Federal Government would fail to instruct the Lieutenant-Governor to exercise the power.

(*bb*) Dom. & Prov. Legis., pp. 757, 762; Prov. Legis., pp. 227, 531.
(*cc*) Dom. & Prov. Legis., p. 1225.
(*dd*) *Ibid*, pp. 458, 927.
(*ee*) See Appendix B.
(*ff*) Statutes of Alberta, 1937 (3rd sess.), pp. 31-9.
(*gg*) Debates of the House of Commons, 1938, Vol. II, p. 1067.

Chapter 7

THE EXERCISE OF THE POWER OF DISALLOWANCE

Second Period: 1881-1896

While in his public utterances during the first fifteen years after Confederation Sir John A. Macdonald posed as a defender of provincial rights, his private correspondence indicates that he was not overly concerned for the rights of the provinces. That he was simply biding his time while he consolidated his power can be seen from this illuminating passage in a letter of October 26, 1868, to Brown Chamberlin, M.P.:

> My own opinion is that the General Government or Parliament should pay no more regard to the status or position of the Local Governments than they would to the prospects of the ruling party in the corporation of Quebec or Montreal. So long as the dual system exists, a certain sympathy will also exist. This was beneficial at the commencement of matters and should be kept up, at all events for this parliament, until the new constitution shall have *stiffened in the mould* (*a*).

Having been returned to power with a resounding majority in 1878, Macdonald found it no longer necessary to be as cautious as he had been in dealing with the provinces. On May 21, 1881, an Ontario statute entirely within the competence of the Legislature, "An Act for Protecting the Public Interests in Rivers, Streams and Creeks", was disallowed on the report of "James McDonald, Minister of Justice, per J.A.M." Some have assumed that J.A.M. was John A. Macdonald and there is much ground for this belief. It is certainly doubtful that James McDonald had anything to do with the report, for it was dated May 17, 1881, just one day before he ceased to be Minister of Justice, and a glance at his remarks, referred to in a previous chapter, indicate that the views expressed in the report were not his.

The facts respecting the disallowed statute appear to have been as follows. One McLaren had by the erection of works converted a non-floatable stream into one suitable for floating logs. Another person, Caldwell, who cut logs higher up the river, demanded the right to float his logs down, but McLaren obtained an injunction preventing Caldwell from doing so. Subsequently, in 1881, the Ontario legislature passed the Act in question which provided that all persons have, and always have had, the right to float logs down rivers, creeks or streams. It also provided that persons like McLaren who had made improvements were entitled to a fee to be determined by the Lieutenant-Governor. McLaren appealed against this action to the Governor General who disallowed the statute. The following portion of the report on the measure gives the reasons why this course was taken:

> The effect of the Act, as it now stands, seems to be to take away the use of his property from one person and give it to another, forcing the owner, practically, to become a toll-keeper against his will, if he wishes to get any compensation for being thus deprived of his rights.

(*a*) Sir Joseph Pope *"Correspondence of Sir John Macdonald"*, p. 75.

> I think the power of the local legislatures to take away the rights of one man and vest them in another, as is done by this Act, is exceedingly doubtful, but assuming that such right does, in strictness, exist, I think it devolves upon this government to see that such power is not exercised in flagrant violation of private rights and natural justice, especially when, as in this case, in addition to interfering with private rights in the way alluded to, the Act overrides a decision of a court of competent jurisdiction, by declaring retrospectively that the law always was, and is, different from that laid down by the court (*b*).

Without going into the wisdom or justice of the Act, it is difficult to see upon what grounds the power of the local legislature to enact it could be said to be "exceedingly doubtful". Commenting upon this point, the Attorney-General of Ontario said in protesting against the action of the Minister of Justice:

> When the Minister of Justice states in his report that the power of a provincial legislature to enact such a law is "exceedingly doubtful", he has assumed a grave responsibility, for he is the first minister who has ventured upon such a proposition, and that, too without submitting any general grounds for an opinion which, if there was any foundation for it, would so seriously affect provincial autonomy. The Minister, however, stands alone in his doubt, and his report contains the first official expression of this, which has emanated from any source. The contrary view has been taken and uniformly acted upon by the Dominion Government since confederation till now, and numerous examples exist to show that the present premier of the Dominion, when Minister of Justice, proceeded upon a directly opposite conclusion, and unequivocally recognized the supreme legislative authority of the provincial legislature, in all subjects within its jurisdiction, notwithstanding its Acts had declared the law to be other than was decided by a court, or interfered with pending litigation, or had been retroactive (*c*).

The fact that this ground was not taken seriously is evident from the fact that when the matter came up for discussion in the House of Commons not one word was wasted upon it. The question was brought to the attention of the House by Mr. H. Cameron who, on April 14, 1882, moved a resolution stating that whatever opinion the Government of Canada might have as to the propriety or impropriety of the Act it had no right to disallow it as it was *intra vires* the provincial legislature and was not of such a nature as to be subject to the judgment of, or disallowance by, the Government of Canada (*d*). The opposition demonstrated that the disallowance of the measure was contrary to the practice that had existed since the original report on disallowance of June 8, 1868, and that the reference to a reserved bill in the report was inapplicable because the principles governing the refusal of assent to reserved bills were not identical to those respecting the disallowance of statutes. They also pointed out that the Act would not have been annulled had McLaren not been a political friend of Macdonald and the Ontario government, Liberal—an assertion that is certainly borne out by the facts.

Macdonald and his followers found it not a little difficult to demonstrate that the principle of disallowing for reasons such as stated in the report was not new. They relied principally on remarks made respecting reserved bills and especially one of Prince Edward Island of 1874 that

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(*b*) Dom. & Prov. Legis., p. 178.
(*c*) *Ibid*, p. 184.
(*d*) Debates of the House of Commons, 1882, p. 885.

was similar to one given assent to in 1875 in violation of the rule that the Federal Government should not give validity to bills affecting only provincial interests. But that this was not a valid argument becomes apparent when we consider that about the same time that Macdonald was making his speeches in respect of the New Brunswick School Acts, he had refused to assent to a bill for so trifling a reason as bad drafting. One of the defenders of the action of the Government, Mr. D. McCarthy, all but admitted that this was a new principle; here is what this member had to say:

> Now the Goodhue case was mentioned, and I will say this: That if at this time of day, after several years of Confederation, if such a measure as that was not disallowed, if a measure changing a man's will, as the Local Legislature professed to do in that case, was not disallowed by his Excellency, I think the action of the Minister of Justice and the Administration in refusing that disallowance, would be hard indeed to justify. But it will be remembered that in those days Confederation was young. In those days the Provinces were sensitive, and perhaps the rights of individuals had to some extent to yield to the public necessities of the day. But, Sir, because in that case the hon. the Minister of Justice failed to do what, with more enlarged experience of the working of Confederation he could not hesitate to do at this time of day, is that a reason to be urged against the propriety of the course he recently took? (*e*)

Macdonald, in defending the step taken by his administration, devoted most of his speech to an attempt to show the inconsistency of the resolution with the previous actions of the opposition, relying, as had his supporters, principally upon remarks respecting reserved bills, which, he contended, were subject to the same principles as governed the disallowance of statutes. He avoided any reference to his remarks in regard to the New Brunswick School Acts that had been quoted at considerable length by his opponents and instead sought to show the consistency of his action by referring to his report of 1868, in respect of which he said:

> I laid down the sound and true principle, that the autonomy of every province, the independence of every province, the independence of every Legislature, should be protected unless there was a constitutional reason against it. The Government here are not to set up their opinion against the opinion of the Local Government or the Local Legislature. But the hon. gentleman approved of my letter of 1868. And, Sir, under those resolutions, those different stipulations, those different conditions and terms upon which I reported to the Governor General, that I thought there might be over interference with the Local Legislature—I say, Sir, that this Bill violated distinctly the most important of those conditions (*f*).

Then later he justified the disallowance of the Streams Act and explained what "the most important of these conditions" in his report of 1868 was, in the following passage:

> We were protecting a man from a great wrong, from a great loss and injury, from a course which, if pursued, would destroy the confidence of the whole civilized world in the law of the land. What property would be safe? What man would make an investment in this country? Would capitalists come to Canada if the rights of property were taken away, as was attempted under this Bill? This was one of the grounds on which in that paper of mine, of 1867, (*sic*, 1868) I declared that, in my opinion, all Bills should be disallowed if they affected general interests. Sir, we are not half a dozen Provinces. We are one great Dominion. If we commit an

(*e*) *Ibid*, p. 892.
(*f*) *Ibid*, pp. 920-1.

> offence against the laws of property, or any other atrocity in legislation, it will be widely known. England is so far off that she is not affected by it; she is not so likely to disallow our Bills, however bad they may be, because the consequences fall on our own heads. But here where we are one country and altogether, and we go from one Province to another as we do from one county to another and from one town to another, is it to be borne that laws which bind civilized society together, which distinguish civilization from barbarism, which protect life, reputation and property, should be dissimilar; that what should be a merit in one Province should be a crime in another, and that different laws should prevail. There may be differences in the laws in detail, but the great grand principle, that every man should have the right to occupy his own house and property, sit under his own fig-tree, cultivate his own vine, and be protected in all this, is the common law of all civilized countries and must prevail throughout the Dominion (*g*).

Ontario protested vehemently against the disallowance of the statute and re-enacted it on two more occasions only to have it annulled each time. In 1884 it was again passed, and on this occasion it was not interfered with, the Privy Council in that year having decided that the Legislature's view of the law had been correct and that the decision in McLaren's favour was erroneous.

It was only natural that following the disallowance of this Act a steady stream of petitions flowed into the office of the new Minister of Justice, Sir Alexander Campbell. Unlike his predecessors, this Minister examined the petitions with care even when the subject matter of the Act prayed against was clearly *intra vires* the legislatures. He, however, disallowed no statute for injustice other than the Streams Acts.

Campbell was succeeded in 1885 by Sir John Thompson who was also flooded with petitions. This Minister of Justice does not appear to have been too happy with the principle established in 1881 to which he had fallen heir, for a number of his statements practically repudiate the existence, constitutionally, of such a power. Thus, in 1886, dealing with an Ontario Act that had been petitioned against as being a direct interference with private rights, he said:

> Without expressing any opinion as to whether the Act is a just measure or not, the undersigned is of opinion that it is within the undoubted legislative authority of the legislature of that province, and, therefore, respectfully recommends that it be left to its operation (*h*).

Again in 1889 he made the following statement in respect of an Ontario statute that had been petitioned against:

> The undersigned does not feel... that he can recommend the disallowance of the Act. It is one clearly within the competency of provincial legislation.
>
> It relates to a municipal matter only, and not to a matter affecting in any way the public interests of Canada. Any complaint as to the unfair operation of such an Act should rather be addressed to the provincial legislature than to your Excellency (*i*).

(*g*) *Ibid*, p. 924.
(*h*) Dom. & Prov. Legis., p. 198.
(*i*) *Ibid*, p. 212.

Numerous other statements may be found where he iterates these views (*j*), and when in 1887 a Manitoba statute, "An Act for further improving the Law", was disallowed on the grounds that—

> The immunity from responsibility and liability for their acts, which by this provision is given to contractors and persons employed in the construction of any public work in the province of Manitoba or in doing any work under the direction of the Minister of Public Works or of the Commissioner of Railways of that province is of such an unusual and extraordinary character and constitutes such a manifest interference with private rights that the undersigned is of opinion that the Act should be disallowed without further delay (*k*).

it was John A. Macdonald who made the report. This is significant because there appears to have been no great reason for despatch in this case and Thompson made several reports on provincial statutes on the 16th of July, two days after Macdonald's report was made (*l*).

Some of Thompson's reports seem to be somewhat at variance with those from which extracts have been cited. Thus in 1889 he was prepared to disallow a New Brunswick statute on the grounds that it "interferes with and restricts the operation of an Act of the Parliament of Canada, and has the effect likewise of materially diminishing the value of franchises, which the New Brunswick legislature had previously granted to another company"; but it should be noted that the first of these grounds was sufficient to warrant the disallowance of the statute (*m*). On another occasion in the same year he recommended that a statute of the same province dealing with mines and mining leases be amended because it

> ...seems to be at variance with the principles of justice, and seems to invade the rights of property which it is so important to preserve, for the credit of the whole country, and for the safety of private persons.
>
> If it is desirable that a province should resume any part of its patrimony the methods adopted should be those which recognize and provide for the rights which have accrued under the sanction of the Crown (*n*).

A few other similar statements can be found in his reports (*o*). His actions would, therefore, seem to be somewhat inconsistent. It may be, however, that Thompson was willing to indicate the existence of injustice where he saw it but was unwilling to exercise the power where an Act related solely to local matters. However that may be, a comparison of his statements with those expressed by Sir John A. Macdonald in 1881 and 1887 and by the Honourable J. Aldric Ouimet, who was on occasion Acting Minister of Justice for him, indicates how much less inclined he was to interfere with provincial legislation than were other members of the Government of the day. It was Ouimet, for instance, who thus reported in 1893:

> Assuming the statute to have the effect which the railway company attribute to it, the case would appear to be that of a statute which interferes with vested rights of property and the obligation of contract without providing for compensation and would, therefore, in the opinion of the undersigned furnish sufficient reason for the exercise of the power of disallowance (*p*).

(*j*) See, for instance, *ibid*, pp. 389, 558, 559 and 913.
(*k*) *Ibid*, p. 857.
(*l*) *Ibid*, pp. 337, 338, 339.
(*m*) *Ibid*, p. 749.
(*n*) *Ibid*, p. 750.
(*o*) See, for instance, *ibid*, p. 377.
(*p*) *Ibid*, p. 239.

One of the most controversial provincial statutes passed during Thompson's tenure as Minister of Justice was the Jesuits' Estates Act of Quebec. While no lasting principles respecting disallowance were established during this controversy, it forcibly illustrates the difficulty of pursuing the policy followed by Macdonald during this period. Such a policy puts the Federal Government in the position of having to justify a provincial statute when it is petitioned against on the ground of injustice (*q*).

Thompson's successors during the remaining years of the Conservative regime did not disallow any further Acts on account of injustice, but some remarks of Sir Charles Hibbert Tupper appear to indicate that he considered injustice to be a proper ground for disallowance (*r*).

In addition to the Acts annulled for injustice though *intra vires,* this period saw the disallowance of many other provincial measures within the competence of the local legislatures on the ground that they conflicted with the policy of the Dominion Government. Indeed, most of the Acts disallowed on the grounds that they exceeded provincial legislative capacity also conflicted with Dominion policy in one way or another. This was the period when the first trans-Canada railway was being built and nearly one-half of the thirty-eight Acts disallowed during this period were vetoed on the ground that they interfered with the railway policy of Canada. Some of these Acts appear also to have been *ultra vires,* but by no means all, and the primary consideration actuating Ministers of Justice in advising the use of the veto was the protection of the railway.

As we have seen, during this period considerably greater use was made of the power of disallowance than in the preceding one, and it is not surprising that the provinces should have looked at this frequent exercise of this extraordinary power with grave concern. This anxiety was partly responsible for the convening of an Interprovincial Conference at Quebec in 1887 attended by all the provinces except British Columbia and Prince Edward Island which refused to be represented. The meeting took place on the invitation of the Honourable Mr. Mercier, Premier of Quebec, for the purpose of considering questions "which have arisen or may arise as to the autonomy of the Provinces, their financial arrangements, and other matters of common provincial interest". Sir John A. Macdonald, then Prime Minister of Canada, was invited to attend with one or more of his ministers, but he declined to do so because, in addition to doubting the *bona fides* of the organizers of the meeting, he held the view that the only constitutional representatives of a province in its relation with the Dominion were the members of the Parliament of Canada from that province (*s*). In opening the Conference on October 20, 1887, the Honourable Mr. Mercier enumerated various topics proposed for consideration which included the removal from the Federal Government of the power of disallowing provincial laws. Referring to this topic, the Honourable Mr. Mercier asserted:

> The exercise of the power of disallowing provincial laws presents the gravest objections which it is necessary to remove.
>
> As regards the constitutionality of the laws, that falls naturally within the jurisdiction of the Courts.

(*q*) Debates of the House of Commons, 1889, pp. 811 *et seq.*

(*r*) *Ibid,* pp. 244*f* and 1234.

(*s*) See Pope's "*Correspondence of Sir John Macdonald*", pp. 398-9.

> On the other hand, it should no more be permitted to the Federal Government to disallow a Provincial Act, on the pretext that it affects Federal rights, than it is permitted to Provincial Governments to disallow Federal acts because they affect provincial interests (*t*).

On October 28, 1887, a number of resolutions were unanimously adopted by the Conference, the first two of which are of interest here and read as follows:

> 1. That by the British North America Act exclusive authority is expressly given to the Provincial Legislatures in relation to subjects enumerated in the 92nd section of the Act; that a previous section of the Act reserves to the Federal Government the legal power of disallowing at will all Acts passed by a Provincial Legislature; that this power of disallowance may be exercised so as to give to the Federal Government arbitrary control over legislation of the Provinces within their own sphere; and that the Act should be amended by taking away this power of disallowing Provincial Statutes, leaving to the people of each Province, through their representatives in the Provincial Legislature, the free exercise of their exclusive right of legislation on the subjects assigned to them, subject only to disallowance by Her Majesty in Council as before Confederation; the power of disallowance to be exercised in regard to the Provinces upon the same principles as the same is exercised in the case of Federal Acts;
>
> 2. That it is important to the just operation of our Federal system, as well that the Federal Parliament should not assume to exercise powers belonging exclusively to the Provincial Legislatures, as that a Provincial Legislature should not assume to exercise powers belonging exclusively to the Federal Parliament; that to prevent any such assumption, there should be equal facilities to the Federal and Provincial Governments for promptly obtaining a judicial determination respecting the validity of Statutes of both the Federal Parliament and Provincial Legislatures; that Constitutional provision should be made for obtaining such determination before, as well as after, a Statute has been acted upon; and that any decision should be subject to Appeal as in other cases, in order that the adjudication may be final (*u*).

No action was ever taken upon the request for the abolition of the power of disallowance embodied in the first resolution. Steps were soon taken, however, to provide adequate machinery for the judicial determination of questions respecting the constitutional validity of Federal and provincial statutes. The desirability of obtaining the guidance of the courts in such matters had been considered in 1875 when a section was inserted in the Act establishing the Supreme Court of Canada authorizing the Governor General to refer to that Court for hearing and consideration any matter that he thought fit. This was done because the practice of annulling statutes on the ground of *ultra vires* was not considered too satisfactory (*v*). The section enacted in 1875 was, however, defective in several respects; it made no provision for the representation of interested parties or for obtaining the reasoned opinion of the Court. It was these defects that prompted the Honourable Edward Blake, on April 29, 1890, to move the following amendment to a motion to resolve the House of Commons into Committee of Supply:

> To leave out all the words after "that" and insert the following: "it is expedient to provide means whereby, on solemn occasions touching the exercise of the power of disallowance, or of the appellate power as to

(*t*) *Official) Proceedings of the Inter-Provincial Conference held at the City of Quebec from the 20th to the 28th October, 1887 inclusively*, p. 21.

(*u*) *Ibid*, pp. 27-8.

(*v*) Debates of the House of Commons, 1875, p. 755.

educational legislation, important questions of law or fact may be referred by the Executive to a high judicial tribunal for hearing and consideration, in such mode that the authorities and parties interested may be represented and that a reasonable opinion may be obtained for the information of the Executive".

In an able speech supporting this amendment, Blake explained the relation that should exist between the references he proposed and the power of disallowance in the following passage:

> Now, Sir, in the exercise of this power of disallowance by the Government, political questions will, or at any rate may, probably, always arise. Questions of policy may present themselves, that is questions of expediency, of convenience, of the public interest, of the spirit of the constitution or of the form of legislation. All these are clearly, exclusively for the executive and legislative, that is for the political departments of the Government. But it is equally clear, that when in order to determine your course you must find whether a particular act is *ultra* or *intra vires,* you are discharging a legal and a judicial function... Now, I aver that in the decision of all legal questions, it is important that the political executive should not, more than can be avoided, arrogate to itself judicial powers; and that when, in the discharge of its political duties, it is called upon to deal with legal questions, it ought to have the power in cases of solemnity and importance, where it may be thought expedient so to do, to call in aid the judicial department in order to arrive at a correct solution. The decision that an Act is *ultra vires,* and its consequent disallowance by the Executive are incidents peculiar in practice to ourselves... It is a most delicate function, and its exercise involves most serious ulterior consequences... The question whether it was or was not valid is so removed from judicial cognisance for ever. And thus by repeated exercises of the power of disallowance, in respect to repeated provincial legislation, the Province may practically be deprived of that which all the time may be a real right;—a right claimed, which may be a right justly claimed. Thus, one of two limited Governments, of which it may be said in a general sense that the sphere of the jurisdiction of the one is limited by the sphere of the jurisdiction of the other;—one of these two limited Governments, may practically decide the extent of the limits, of what in a sense, is its rival Government. That is a very delicate position... A decision under such circumstances is almost necessarily a suspected decision. There is a sense in which it is the decision of a party in his own cause... Now, do I say that in all cases the Executive should refer... My motion does not say so... I have referred... to solemn occasions and to important questions; but my motion is framed in this regard in what I conceive to be the spirit of the British and of our own constitution. It is elastic; it leaves a responsibility to the Executive to decide on the action to be taken in the particular case; it deals with the case as exceptional. My own opinion is, that whenever, in opposition to the continued view of a Provincial Executive and Legislature, it is contemplated by the Dominion Executive to disallow a Provincial Act because it is *ultra vires,* there ought to be a reference; and also that there ought to be a reference in certain cases where the condition of public opinion renders expedient a solution of legal problems, dissociated from those elements of passion and expediency which are rightly or wrongly, too often attributed to the action of political bodies... But, Sir, besides the great positive gain of obtaining the best guidance, there are other, and in my opinion, not unimportant gains besides. Ours is a popular government; and when burning questions arise inflaming the public mind, when agitation is rife as to the political action of the Executive or the Legislature—which action is to be based on legal questions, obviously beyond the grasp of the people at large;—when the people are on such questions divided by cries of creed and race; then I maintain that a great public good is attainable by the submission of such legal questions to legal tribunals, with all the

> customary securities for a sound judgment; and whose decisions—passionless and dignified, accepted by each of us as binding in our own affairs, involving fortune, freedom, honor, life itself—are more likely to be accepted by us all in questions of public concern (*w*).

The resolution met with the approval of Sir John A. Macdonald, and at the following session of Parliament the Supreme and Exchequer Courts Act was, by section 4 of chapter 25 of the statutes of 1891, amended so that references to the Supreme Court would be conducted in the manner Blake had proposed. In addition, decisions of that Court in such references were made appealable to the Privy Council. This now appears as section 55 of the present Supreme Court Act, without, of course, the right of appeal.

As to statutes believed to be *ultra vires*, the usual practice during this period was to leave them to the determination of the courts. Nevertheless when an Act of this kind was in whole or in part a clear invasion of Federal jurisdiction, Ministers of Justice did not hesitate to recommend disallowance. Nor did they neglect to make use of the power of disallowance when such an Act interfered with the policies or interests of the Dominion, or when it would lead to private injury or could not conveniently be left to the Courts. The principle was aptly expressed by Blake in the speech from which we have just quoted when he said:

> I think I may say, that it is now generally agreed that void Acts should not be disallowed, but should be left to the action of the courts. It is, nevertheless, and I think with sound reason, contended, that circumstances of great general inconvenience or prejudice from a Dominion standpoint, and involving difficulty, delay, or the impossibility of a resort to law, may justify the policy of disallowance, even in cases in which the Act is *ultra vires*, and therefore void (*x*).

It should also be noted that without threatening to use the power, it was not unusual for the Ministers of Justice of this period to indicate that an Act was *ultra vires* and to suggest that it be amended.

Finally, the third ground mentioned in Macdonald's report of June, 1868, was used. One instance was an Ontario Act respecting licence duties, disallowed in 1884 because it tended to render the Liquor Licence Act of the Federal Government inoperative (*y*).

(*w*) Debates of the House of Commons, 1890, Vol. 2, Cols. 4084-4094.
(*x*) *Ibid*, col. 4085.
(*y*) Dom. & Prov. Legis., p. 194.

Chapter 8

THE EXERCISE OF THE POWER OF DISALLOWANCE

Third Period: 1896-1911

The practice of disallowing statutes for injustice, which had been on the wane since Macdonald's death in 1891, was definitely ended with the coming into power of Sir Wilfrid Laurier's Liberal government. Sir Wilfrid had made it quite clear years before that he would brook no intervention by the Federal Government in matters exclusively assigned to the provinces by the British North America Act unless Federal policies or interests were involved. Thus in discussing the Streams Bill in 1882 he had declared:

> It is said that the Provincial Legislature may do wrong—and it did wrong in this instance; but this Government may also do wrong; and in whose favor shall we decide? There is a standard rule dividing right from wrong within a Province. The Legislature should be supreme. Within the whole Dominion, the Dominion Parliament will be supreme; but it does not lie in the mouths of the hon. gentlemen opposite to say that the Dominion Parliament is responsible to the people of the country. It is responsible to the people of the whole country, but the Legislature of Ontario is responsible to the people of Ontario, and so it is with respect to Quebec; and to allow the Dominion Government to judge their Acts according to their standard of what is right and wrong, would be to apply a remedy that will be far worse than the evil itself (*a*).

And he had repeated this view seven years later when the Jesuits' Estates Act of Quebec came up for discussion in the Commons. Pages 897-8 of Hansard of 1889 record his view at the time:

> Among the many questions which divided the two parties, there is no one upon which the policy of the two parties has been so clearly cut as upon this. The Conservative party, led by the right hon. gentleman, have always held the doctrine that they have the right to review the legislation of any Local Legislature. We, on the other hand, have always pretended that the only way to carry out this Confederation is to admit the principle that within its sphere, within the sphere allotted to it by the Constitution, each Province is quite as independent of the control of the Dominion Parliament, as the Dominion Parliament is independent of the control of the Local Legislatures. On the contrary, the hon. gentleman has maintained again and again upon the floor of this House and by administrative acts that he claimed the power to review local legislation, to see whether it was right or wrong, and, if he found it clashing with his ideas of right, to set it aside.

The guidance thus offered was not disregarded by the Ministers of Justice of this period; no Act was disallowed or threatened with disallowance by any of them on the ground of injustice or inexpediency.

Not enough is conveyed by the reports of Laurier's first Minister of Justice, Sir Oliver Mowat, to make it clear whether or not he would have considered using the power of disallowance in the interest of justice. Some of his reports do seem, however, to suggest that he considered it a valid ground. Thus, in dealing with a statute of New Brunswick that

(*a*) Debates of the House of Commons, 1882, p. 907.

had been complained of by the City of Fredericton as being unjust, the Minister affirmed that "although the provision is somewhat an unusual one..., yet the undersigned does not consider that the injustice complained of is such, or so apparent, as would justify Your Excellency in interfering by the exercise of the power of disallowance with a matter which is otherwise entrusted entirely to Provincial authority" (*b*). That Sir Oliver would ever have recommended the disallowance of a provincial statute simply because it conflicted with his notions of what was right or wrong seems inconceivable, however, for this would have involved the repudiation of a settled policy of the Liberal Party. Further, this appears to run completely counter to the whole tenor of his political principles. He had always championed the view that the local legislatures should be co-ordinate with, and not subordinate to, the General Parliament, as his activities at the Quebec Conference of 1864 and the interprovincial meeting of 1887 clearly demonstrate. In addition, it was his government that so vigorously opposed and protested against the disallowance of the Rivers and Streams Bill. It would, therefore, appear that the following passage in a letter written by him as Attorney General for Ontario to the Minister of Justice in 1893 reveals his opinion on the matter with greater accuracy than the report to which reference has just been made:

> I repudiate the notion of the petitioners that it is the office of Dominion Government to sit in judgment on the right and justice of "An Act of the Ontario Legislature relating to Property and Civil Rights," that is a question for the exclusive judgment of the provincial legislature... (*c*)

If Sir Oliver said little on the subject when he was Minister of Justice, his successors, Mills, Fitzpatrick and Aylesworth, were by no means reticent in expressing their opinion that the Governor General had no constitutional right to intervene in matters that were within the competence of the provincial legislatures and that did not infringe upon the policy of the Dominion Government in respect of matters upon which, under the British North America Act, it had a right to have a policy. Thus on December 31, 1901, the Honourable David Mills, in dealing with a petition to disallow an Ontario statute, declared:

> The undersigned conceives that Your Excellency's government is not concerned with the policy of this measure. It is no doubt *intra vires* of the Legislature, and if it be unfair or unjust or contrary to the principles which ought to govern in dealing with private rights, the constitutional recourse is to the Legislature, and the acts of the Legislature may be ultimately judged by the people. The undersigned does not consider, therefore, that Your Excellency ought to exercise the power of disallowance in such cases (*d*).

On the same day he based his refusal to recommend the disallowance of an Act of British Columbia respecting certain land grants against which objection had been taken

> ...upon the fact that the application proceeds upon grounds affecting the substance of the Act with regard to matters undoubtedly within the legislative authority of the province and not affecting any matter of Dominion policy. It is alleged that the statute affects pending litigation, and rights existing under previous legislation and grants from the province. The undersigned considers that such legislation is objectionable

(*b*) Prov. Legis., p. 402; see also p. 287.
(*c*) Dom. & Prov. Legis., p. 231.
(*d*) Prov. Legis., p. 52.

> in principle and not justified, unless in very exceptional circumstances, but Your Excellency's government is not in anywise responsible for the principle of the legislation, and... the proper remedy in such cases lies with the legislature or its constitutional judges (*e*).

A further petition against the latter statute received similar treatment a few months later at the hands of the newly appointed Minister of Justice, Sir Charles Fitzpatrick, who reported, *inter alia,* that

> The undersigned cannot help expressing his disapprobation of measures of this character, but there is a difficulty about Your Excellency in Council giving relief in such cases without affirming a policy which requires Your Excellency's government to put itself to a large extent in the place of the legislature and judge of the propriety of its acts relating to matters committed by the constitution to the exclusive legislative authority of the province (*f*).

Two years later, reporting upon a statute of Manitoba adversely affecting the rights of holders of debentures of the insolvent Town of Emerson, the same Minister repeated these views as follows:

> The undersigned entertains no doubt that the Act is within the authority of the legislature, and whatever views Your Excellency's Government may entertain as to the propriety of legislation intended to reduce or affect the obligation of a municipality to its debenture holders, such view cannot in the opinion of the undersigned either consistently with the constitution or practice which has hitherto prevailed be invoked as justifying the disallowance of this Act. The legislation is within the scope of the subjects assigned exclusively to the provinces. The Legislative Assembly is the constitutional judge of the objections which are urged by the petitioners, and it is to the Assembly which they must look for redress if any (*g*).

Of the same opinion was Sir Allen Aylesworth. In 1908 the Florence Mining Company petitioned the Governor General to disallow a statute of the Ontario legislature confirming a sale by the Ontario government to the Cobalt Mining Company of a valuable mining claim to which the petitioning Company claimed to be entitled. Referring in the course of his report upon the petition to earlier precedents, Sir Allen pointed out that

> These authorities, if followed, would doubtless require the disallowance of the present Act, but during later years different views have prevailed and in many cases applications for disallowance upon the ground of undue interference with vested rights have been refused for the reason that it is contrary to the true intent and spirit of the British North America Act that the Dominion Government should inquire into or determine the merits of provincial legislation which is *intra vires* and not in conflict with Dominion policy.

Then having stated that he was in agreement with the latter views, he continued:

> In his opinion it is not intended by the British North America Act that the power of disallowance shall be exercised for the purpose of annulling provincial legislation, even though Your Excellency's Ministers consider the legislation unjust or oppressive or in conflict with recognized legal principles so long as such legislation is within the power of the Provincial Legislature to enact.

(*e*) *Ibid,* p. 606.
(*f*) *Ibid,* p. 617.
(*g*) *Ibid,* p. 488.

> The undersigned is of the opinion that where an Act is of a merely domestic or local character and does not affect any matter of Dominion interest Your Excellency's Government ought not to review the policy or propriety of the measure which is exclusively a matter of provincial concern, and he accepts the general view that it is not the office or right of the Dominion Government to sit in judgment considering the justice or honesty of any Act of a provincial legislature which deals solely with property or civil rights within the province.

He concluded with a recommendation that, although the legislation in question amounted to a confiscation of property without compensation and was thus an abuse of legislative power, it should not on that account be disallowed but should be left to such operation as might lawfully be given to it (*h*).

On March 1, 1909, the matter was discussed in the House of Commons, and Sir Allen there defended his views as follows:

> The large question of principle which was presented for consideration was simply whether or not the provincial legislature has the power, without control, to take one man's property and give it to another and to take away from the person injured any right of redress in the courts... I entertain in all honesty and sincerity the view that it is of vital consequence to the well-being of this Dominion that the rights of the provinces to legislate within the scope of their authority should not be interfered with, and that every provincial legislature, within the limits prescribed for it by the terms of the British North America Act, is and ought to be supreme. I believe that this is a principle of greater importance to the welfare of this Dominion as a whole than even the sacredness of private rights or of property ownership. I am willing to go thus far in the enunciation of the views I am stating to this House, that a provincial legislature, having as is given to it by the terms of the British North America Act, full and absolute control over property and civil rights within the province, might if it saw fit to do so, repeal Magna Charta itself... I take the ground that rights of property are subject only to the control of provincial legislatures within Canada. Having that view it seemed to me in considering this legislation that I was not, as advising His Excellency in Council, called upon to think at all of the injustice, of the outrageous character it might be of the legislation, but that my one inquiry ought to be whether or not there was anything in the legislation itself which went beyond the power of the provincial legislature to pass a law referring alone to property and civil rights within the province... My view was, and is, that any measure of this sort is one in regard to which the only appeal from the provincial legislature ought to be to the people who elect that legislature, and who, if they please, may dethrone the government of the day and deprive it of power (*i*).

Not content with this, Aylesworth strongly reasserted his views the following year when dealing with an Act to amend the Power Commission Act of Ontario in respect of which a large number of petitions had been submitted to the Governor General. Having cited extracts from cases expounding the view of the Privy Council that a court of law had no jurisdiction to interfere with provincial legislation because it seemed to be an abuse of power, he went on:

> ...while Your Excellency's Government in the exercise of the power of disallowance must in many cases proceed upon grounds different from those which influence courts of justice in the determination of the validity of a statute, yet, in the opinion of the undersigned, a suggestion of the abuse of power, even so as to amount to practical confiscation of

(*h*) *Ibid*, pp. 80-3.

(*i*) Debates of the House of Commons, 1909, Vol. I, cols. 1752-7.

> property, or that the exercise of a power has been unwise or indiscreet, should appeal to Your Excellency's Government with no more effect than it does to the ordinary tribunals, and the remedy in such cases is, in the one case as in the other, in the words of Lord Herschell, an appeal to those by whom the legislature is elected.
>
> The undersigned does not intend by the foregoing observations to express any view either favourable or unfavourable to the merits of the Act in question. The policy of the legislation, as well as the manner in which it is worked out by the various provisions of the statute, are within the sole responsibility of the local legislature (*j*).

The practice of referring to statements of the Privy Council in this connection was not new with Aylesworth; Mills had made the same use of them some years before (*k*). These Ministers thereby suggested that their use of the veto was the only one consistent with the views of the Judicial Committee respecting the supremacy of the provincial legislatures within the sphere assigned to them by the British North America Act.

But while the Ministers of Justice of this period assiduously refrained from recommending disallowance on the grounds that an Act was unjust, unwise or an abuse of power, they had no doubt as to the propriety of annulling provincial statutes that conflicted with Dominion policies or interests, and they frequently recommended this course. Their attitude towards this aspect of the matter has never been better expressed than in a report of the Honourable David Mills on a Prince Edward Island Statute on the 8th of November, 1898, in which he said:

> The power of disallowance has, however, been vested in Your Excellency, not only for maintaining the constitutional lines of legislative authority, but also for preventing the provincial legislatures from interfering with Dominion policy in matters in which it is competent under the constitution to the Dominion Government to have a policy. There may be provincial legislation which can have effect until superseded by Parliament, and as to such the undersigned apprehends the power of disallowance may be properly exercised if the legislation be in the opinion of Your Excellency's Government prejudicial to Dominion interests (*l*).

Notable among the Acts disallowed for this reason are a series of British Columbia statutes adversely affecting Asiatics in that province. It is not without interest that these Acts were negatived, not solely because they conflicted with Dominion policy, but also as affecting the relations between the Empire and Japan. This can be considered as a separate ground for the exercise of the veto, but another way of looking at it is that it was the policy of the Dominion to conform as much as possible to the views of the mother country, and this was particularly true in matters affecting foreign relations in which Canada had as yet no voice. However, it was not only in matters affecting foreign relations that this ground was relied on. In 1911, a statute of Ontario to revise and amend the Chartered Accountants Act was disallowed on the recommendation of Sir Allen Aylesworth because the British Colonial Office had protested that the Act perpetrated an injustice against members of the English Institute of Chartered Accountants by preventing them from using a title to which they had a right under a British statute. This

(*j*) Prov. Legis., p. 96.
(*k*) *Ibid*, p. 461.
(*l*) *Ibid*, p. 764.

ground of disallowance was one that had been mentioned as early as 1876 by Blake (*m*), and Sir Alexander Campbell had disallowed a British Columbia Act of 1884 to prevent the immigration of Chinese into that province, partly because it might involve Imperial interests (*n*).

Disallowance was also invoked in this period when provincial legislation prejudiced the operation of Federal statutes—the third ground mentioned by Macdonald in 1868. Thus, in 1909, an Act relating to chartered accountants similar to that previously discussed was disallowed as being in direct conflict with competently enacted Dominion legislation (*o*).

As to Acts suspected of being *ultra vires*, the practice was now settled that they should be left to their operation if they were of such a nature that they might, without doing harm, conveniently be left to the decisions of the courts. When, however, a statute conflicted with Dominion policy or interests, or was of such a nature that great confusion or loss might result to persons outside the province from leaving the Act to its operation, the Ministers of Justice of this period had little hesitation in advising the use of the power. Many of the statutes disallowed or threatened with disallowance in this period on this ground were provincial Acts purporting to confer upon companies powers extending beyond the province —powers that, in the opinion of these Ministers of Justice, could only be granted by the Federal Parliament. Such Acts might result in serious damage to large numbers of persons throughout Canada, and the Federal Government considered it its duty to prevent their operation whenever they thought this danger imminent. The Prime Minister, reporting for Aylesworth on a number of Saskatchewan statutes in 1911, set out the guiding principles on this point as follows:

> The power of disallowance is conferred upon the Government of Canada to be administered constitutionally, and while great care should be taken to see that the execution of this power does not unduly interfere with the operation of provincial laws, competent to the legislatures and consistent with the general interest, it is equally the duty of Your Excellency's Government when persuaded by authority or upon due consideration that a provincial enactment is *ultra vires* of the legislature to see that the public interest does not suffer by an attempt to sanction locally laws which can derive their authority only from the Parliament.
>
> Ministers may of course err in the interpretation of constitutional powers, but they should not on that ground decline to give effect to what they deem to be a just conclusion. In the present case the undersigned finds himself in agreement with the Ministers of Justice from the time of Confederation, and also supported by the high judicial authorities to which he has referred.
>
> If the powers which these Acts profess to confer as to extra-provincial business be *ultra vires*, it requires no argument to prove the inexpediency of executing them. Great confusion and hardship may result from a statutory corporation carrying on a trust or investment business in excess of its corporate powers (*p*).

(*m*) Dom. & Prov. Legis., p. 268.
(*n*) *Ibid*, p. 1092.
(*o*) Prov. Legis., p. 89.
(*p*) *Ibid*, p. 786.

In all, thirty Acts were disallowed during this period, the principal ground for the use of the veto power being interference by the local legislatures with the policies or interests of the Dominion upon matters in respect of which it was competent under the constitution for the Dominion to have a policy. The number of statutes nullified is somewhat misleading, however, for many of these were simply re-enactments of Acts previously disallowed.

Chapter 9

THE EXERCISE OF THE POWER OF DISALLOWANCE

Fourth Period: 1911-24

The Right Honourable Charles Doherty, who became Minister of Justice when the Conservatives returned to power in 1911, wasted no time in expressing his dissent from the view of his predecessor that the Governor General should in no case be advised to disallow a statute by reason of injustice or because of its interference with vested rights or the obligations of contract. In his first report to the Governor General in Council upon the matter, on January 20, 1912, he had occasion to deal with an Alberta statute that had been petitioned against as affecting the security of a bondholder, and although he refused under the circumstances of the case to grant the prayer of the petition, he nevertheless affirmed that he entertained "...no doubt... that the power is constitutionally capable of exercise and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or property through the operation of local statutes *intra vires* of the legislatures" (*a*).

This view he was to reiterate on numerous occasions during the long period that he held the position of Minister of Justice. Further, he did not agree with the argument that this attitude ran counter to the spirit of such decisions of the Privy Council as *Hodge v. The Queen* and the *Fisheries Case*. This argument, of which we find a suggestion in the reports of Mills and Aylesworth, was advanced by the Attorney General of Ontario in 1912 when, pursuant to a report of the Minister of Justice, the Federal Government had enquired of the provincial authorities as to the reasons that were thought to justify a statute that revested in the province the beds of waters and streams previously granted. To this Mr. Doherty replied:

> These remarks of the Judicial Committee define with precision the situation so far as the courts are concerned and show the futility of any attempt to obtain judicial redress of a grievance founded upon unjust enactments which the legislature has power to make. They are not, however, in anywise concerned with the exercise of Your Royal Highness's prerogative of disallowance; and it is, the undersigned apprehends, not only because legislative powers may be exceeded, but also because they may be abused, that the authority is conferred constitutionally upon the Governor General to disallow measures, which in the public interest, for the one reason or the other, should not be allowed to operate (*b*).

But while he thus gave voice to wider views as to the proper scope for the exercise of the veto power than had any of his predecessors in this century, Doherty was nevertheless extremely reluctant to interfere with validly enacted local legislation. Several reasons gave rise to this reluctance: one was his desire to avoid any action that might infringe

(*a*) Prov. Legis., p. 801.
(*b*) *Ibid*, p. 105.

upon the autonomy of the provinces or embarrass them in the execution of some legislative policy that they might wish to adopt; another, that he was often in no position to judge the merits of local legislation because of the practical difficulty of ascertaining the facts, a reason that was made all the stronger by his belief that "the burden of establishing a case for the execution of the power lies upon those who allege it" (*c*). These reasons came into play when, in 1917, he refused to advise the annulment of two Ontario statutes that had been petitioned against as being *ultra vires* and an unjust interference with vested rights. Dealing with the second of these grounds the Minister reported:

> Then it is said that the legislation is bad in principle, unfair and confiscatory, because it is intended to take away or prejudice rights acquired by the Company under its contract to which the Province is in effect a party; and especially so in view of the fact that the Company has made very considerable expenditures and incurred large obligations upon the security of the rights or concessions which it had by means of the contract obtained. It would seem from the Attorney General's letter that there are questions of fact outstanding as between the petition and the allegations of the Government, and these Your Excellency's Government has no means to try; but assuming the differences of fact to be eliminated in favour of the petition, the undersigned, while he does not hesitate to express strong disapproval of legislation which is intended to break down or take away legitimate contract rights without compensation, is not prepared to recommend this consideration as a ground for the exercise of the power of disallowance in the circumstances of this particular case. The legislature is directly responsible for the policy, merits and justice of its legislation. Its powers are plenary and exclusive within the limits by which they are confined, and although doubtless they must be exercised subject to the control of the Governor General in Council, that control cannot in the opinion of the undersigned be constitutionally exercised upon the principle of substituting the judgment of the Dominion Executive for that of the local legislature, in relation to matters which are strictly confined to the field of local self-government (*d*).

Mr. Doherty's reluctance to interfere with provincial legislation can best be demonstrated by observing that, although many Acts were petitioned against in the decade during which he was Minister of Justice, only one was disallowed and none—other than a few containing *ultra vires* provisions—were amended at his instance. The disallowed statute was the "Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917" of British Columbia, which was annulled because it constituted an invasion of valuable proprietary rights granted by the Dominion pursuant to an agreement sanctioned by legislation involving the Dominion and the province. The matter, therefore, involved the honour and good faith of the Crown and would certainly have been considered a proper matter for intervention by any Minister of Justice as falling within the fourth principle set out in Macdonald's report of 1868. In an elaborate report upon this Act, Doherty thus defined his principles:

> It will be perceived by review of the reports of the Ministers of Justice from the Union to the present time, that there has been great reluctance to interfere with provincial legislation, and that notwithstanding a considerable number of cases in which disallowance was sought upon established grounds, perhaps not more than a single statute has been actually disallowed by reason merely of the injustice of its provisions. Cases are not lacking, however, in which disallowance has been avoided

(*c*) *Ibid*, p. 801.
(*d*) *Ibid*, p. 137.

by reason of amendments undertaken by the local authorities, upon the suggestion of the Ministers of Justice, to remedy the complaints against the original Acts; and certainly the constitutional propriety and duty of reviewing provincial legislation upon its merits when it is the subject of serious complaint has been maintained by every succeeding Minister of Justice from the time of the Union, save only the immediate predecessor of the undersigned, who suggested in effect that the power had become obsolete. In the opinion of the undersigned the power is unquestionable and remains in full vigour. Indeed the very careful consideration which the Ministers have been accustomed to give to applications presented from time to time for disallowance depending upon reasons of inequality or hardship is inconsistent with any other view. But although the Governor in Council exercises constitutionally a power of review and control, he is certainly not responsible for the policy, wisdom or expediency of provincial legislation, and therefore he should not disallow merely because an Act is in his judgment ill-advised, untimely or defective; or because its project lacks either in principle or detail that degree of equity and consideration of the existing situation which in the opinion of the Governor in Council should have commended itself to the legislature. Indeed it must be realized in the exercise of the power of disallowance that legislative judgment upon provincial matters is committed to the legislatures and not to Your Excellency in Council, and that the former therefore have a reasonable and just degree of freedom to work out their measures of legislation in the manner which the legislatures deem requisite or advisable or best adapted reasonably to provide for the situation in hand. On the other side it cannot be denied that there are principles governing the exercise of legislative power, other than the mere respect and deference due to the expression of the will of the local constituent assembly, which must be considered in the exercise of the prerogative of disallowance. It may be difficult, and it is not now necessary to define these principles for purposes of general application; certainly although legislative interference with vested rights or the obligation of contracts, except for public purposes, and upon due indemnity, are processes of legislation which do not appear just or desirable, nevertheless, it would, in the opinion of the undersigned, be formulating too broad a rule to affirm that local legislation affected by these qualities should in all cases be displaced by means of the prerogative.

Then, after having discussed the Act in question, he turned to a consideration of the submission of the Attorney General of British Columbia that disallowance would involve a serious interference with provincial rights. The correctness of this submission Doherty did not admit. It was based, he thought, upon a misconception of the terms and spirit of the British North America Act, which he believed conferred the power of disallowance upon the Governor General not only for the purpose of maintaining the position of the Central Government but also to protect the provinces against unwise and ill-considered enactments. This can be seen from the following excerpt:

Upon the submission of the Attorney General that disallowance would involve a serious interference with provincial rights, the undersigned observes that provincial rights are conferred and limited by the British North America Acts, and while the Provinces have the right to legislate upon the subjects committed to their legislative authority, the power to disallow any such legislation is conferred by the same constitutional instrument upon the Governor General in Council, and incident to the power is the duty to execute it in proper cases. This power and the corresponding duty, are conferred for the benefit of the Provinces as well as for that of the Dominion at large. The system sanctioned by the Act of 1867, as interpreted by the highest judicial authority, "provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself, except under the control of the whole

> acting through the Governor General". The mere execution of the power of disallowance does not therefore conflict with provincial rights, although doubtless the responsibility for the exercise of the power which rests with Your Excellency in Council ought to be so regulated as not to be made effective except in those cases in which, as in the present case, the propriety of exercising the power is demonstrated (*e*).

The first Liberal Minister of Justice under Mackenzie King, Sir Lomer Gouin, agreed with Doherty's view that the Governor General in Council could constitutionally review provincial legislation on its merits. This Minister of Justice was, however, by no means as circumspect as his predecessor had been in reviewing validly enacted local legislation. In 1922 "An Act to vest certain lands in Victoria County in Jane E. MacNeil" was annulled on his recommendation. The disallowed Act vested in Jane MacNeil a parcel of land in fee simple, subject to the same trusts and equities as existed before 1911, and further provided that all claims to these trusts would be barred unless, within one year from the passing of the Act, proceedings were started in the Supreme Court of Nova Scotia to establish them. The Act was passed by the Legislature of Nova Scotia in order to evade a judgment of the Supreme Court of Canada in a case that, in the opinion of the legislature, had been badly presented to the Court. The Act having been petitioned against, Sir Lomer conducted the usual communications with the provincial authorities and in reply was informed that the Act was not a government measure and that Nova Scotia would not oppose its disallowance if the case were regarded as exceptional and not as a precedent. Reporting upon the measure in October, 1922, Sir Lomer remarked that upon careful consideration he was "unable to escape the conclusion that the Act... is so extraordinary and so opposed to the principles of right and justice that it clearly falls within the category of legislation with respect to which it has been customary to invoke the power of disallowance" and that he was "not aware of any circumstances whatever, moral, equitable or legal,... in justification" of it. But it was not only because the statute was inequitable that he acted to prevent its operation. The Minister was also affected by the following considerations:

> Whatever may be said on one side or the other, the fact remains that the Legislature in passing this Act constituted itself a court of appeal from the Supreme Court of Canada, thereby removing the case from the judicial tribunal expressly established for the administration of justice in the Province, and the undersigned is convinced that in such case the Act should not be left to its operation.

In language reminiscent of the report upon the Ontario Rivers and Streams Act in 1881, Sir Lomer summarized his objections to the Act in the following passage:

> Its purpose and effect is to take away from private persons property and rights acquired by them upon the strength of the judgment of the highest court in Canada, in affirmation of the judgment of the highest court of the Province, and vest the property in one who by the judgment of said courts originally had no right or title thereto (*f*).

(*e*) *Ibid*, pp. 708-10.

(*f*) Report of the Minister of Justice dated the 17th day of October, 1922; P.C. 2212 and P.C. 2213, both dated the 21st day of October, 1922.

The matter came up for discussion in the House of Commons on May 1, 1923, on Sir Henry Drayton's motion that the annulment of the statute "was an abuse of the Dominion's power of disallowance, such statutes being entirely *intra vires* of the Province and not interfering with any matter the subject of Dominion policy or administration" (*g*). The interesting point about this debate is that the traditional positions of the two major parties upon the question of disallowing legislation for injustice were now reversed, a situation that is illustrated by the fact that throughout the debate the Conservatives relied on the opinions of former Liberal Ministers of Justice while the government bolstered its case with quotations from reports of former Conservative Ministers. The age old cleavage between the two parties on this point had been entirely disregarded.

Turning now to a consideration of Acts thought to be *ultra vires*, the Ministers of Justice of this period appear to have followed the general lines drawn by their predecessors, that is, while they refused to interfere with statutes that could conveniently be left to the determination of the courts, they occasionally recommended that amendments be made to provincial statutes that were plainly *ultra vires* or that interfered with Dominion policy. In 1915, speaking of an Ontario statute, Doherty expressed his agreement with Blake's view that "void Acts should not be disallowed, but should be left to the action of the courts", but he added that "occasions may nevertheless present themselves, and have in fact occurred, in which the absence of a decision upon the case by the courts of law, or conformably with such a decision, a Minister of Justice might advise disallowance of a statute upon grounds of ultra vires..." (*h*). Though a number of statutes were modified on the recommendation of the Ministers of Justice of this period, only one occasion actually arose when an Act was disallowed on this ground. This Act was one passed by the legislature of British Columbia in 1921. Following an attack upon its validity by the Japanese Consul General, it was referred to the Supreme Court. That Court having decided against the constitutionality of the statute, it was disallowed on the recommendation of Sir Lomer Gouin (*i*).

Before leaving this period some attention must be given to an unusual exercise of the Dominion's veto power in 1922 in relation to two Nova Scotia statutes passed for the purpose of changing the rule of the road, one being an Act to amend an Act relating to the use of the road, the other, an amendment to the existing Motor Vehicles Act. By some inadvertence the first Act provided that persons driving upon the highway should pass on the left, whereas the Act relating to motor vehicles enacted that they should pass on the right. The government of Nova Scotia, which had introduced the measures, asked that they be disallowed because the confusion consequent upon this situation constituted a grave danger to life and property. In his report of July 31, 1922, Sir Lomer indicated that he was not aware that the question of the propriety or otherwise of disallowing a provincial statute in such a case had ever been considered.

(*g*) Debates of the House of Commons, 1923, Vol. III, p. 2347.

(*h*) Prov. Legis., p. 119.

(*i*) Report of the Minister of Justice dated the 27th day of March, 1922; P.C. 743 and P.C. 744, both dated the 31st day of March, 1922.

He, however, submitted that "the confusion consequent upon this situation... constitutes grave danger to the lives and property of persons resident as well within as without the Province, and may, therefore, be said to be a matter in some measure affecting the welfare of the people of Canada". While in general recognizing "the inexpediency of disallowing a provincial act because its provisions may be thought to conflict with some other statute or because a request for disallowance is made by the Government of the Province", he nevertheless concluded "that the present case is clearly distinguishable from the ordinary case of conflicting legislative provisions". Finally, having expressed the view that the calling of a special session of the legislature or a reference of the matter to the courts might meet the needs of the situation, he averred that there were "obvious objections to both of these methods" and that he was convinced that disallowance would "best meet the needs of the case... in view of all the circumstances" (*j*). The Act was accordingly disallowed on the 5th day of August, 1922.

(*j*) Report of the Minister of Justice dated the 31st day of July, 1922; P.C. 1624 and P.C. 1625, both dated the 5th day of August, 1922.

Chapter 10

THE EXERCISE OF THE POWER OF DISALLOWANCE

Fifth Period: 1924-54

The appointment of the Honourable Ernest Lapointe as Minister of Justice marks the begining of the latest trend in the exercise by the Governor General of the power of disallowing provincial statutes. Throughout this period there can be discerned a marked disinclination on the part of Ministers of Justice to recommend disallowance. The vast majority of their annual reports state simply that the Minister has examined the statutes of the province concerned and that "he is of opinion that these Statutes may be left to such operation as they may have". This is followed by a recommendation that a copy of the report "be transmitted to the Lieutenant-Governor... for the information of his Government".

Mr. Lapointe was, as regards his views concerning the propriety of annulling provincial statutes, a disciple of Sir Allen Aylesworth, that is, he considered that Acts within provincial legislative competence should not be disallowed unless they conflicted with Dominion interests or policies. Being the immediate successor in office of a fellow Liberal who not only considered it proper to disallow, but in fact recommended the disallowance of one Act, *inter alia,* on the ground of injustice, he found it inadvisable during the early years of his tenure of office to express his attitude on this point. He, however, consistently refused to disallow statutes simply because he considered them to be unwise, unjust or inexpedient. And when he had occasion in 1924 to recommend the disallowance of a statute of Alberta entitled "An Act to impose a Tax upon Minerals", he was careful to indicate that, though he was aware that the Act worked a grave injustice against those who had petitioned against it, this was not the ground upon which he recommended its annulment. The *ratio decidendi* of that report appears in this passage:

> It will have been perceived that the petitioners have presented a case of considerable hardship, and that they rely not only upon the character of the legislation which is described as unjust, oppressive and discriminatory, but also upon the contention that the statute is not within the enacting authority of the legislature; while on the contrary, it is maintained on behalf of the province that the legislation, if *intra vires,* ought not to be reviewed on its merits by Your Excellency, because it is enacted by the Provincial Legislature, which is sovereign and independent within the scope of its powers; and if *ultra vires,* that the statute ought not to be disallowed upon that ground, because it is then inoperative and may be so declared by the courts in appropriate judicial proceedings. If however effect be given to these submissions of the province, no place is left for the operation of the power of disallowance which is in express language conferred by Sections 56 and 90 of the *British North America Act 1867.* That the power exists is not questioned, and it may operate with regard to any provincial statute "if", in the words of the two sections last mentioned, "the Governor General in Council within one year after receipt thereof by the Governor General thinks fit to disallow the Act". While the discretion thus belonging to Your Excellency in Council ought of course to be wisely exercised upon sound principles of public policy, and having due regard to local powers

58722—6½

> of self government, there are cases in which disallowance affords a constitutional remedy, and it is implicit that the exercise of the power ought not to be withheld when the public interest requires that it should become effective. It is not necessary... to review the legislation upon its merits with relation to the position or interests of mineral owners in the province who are subject to the provincial taxing powers, or whose property and civil rights in the province are affected, by the operation of the provincial laws. There are reasons which have influenced the undersigned to submit his recommendation upon this report which are not affected by the mere grounds of injustice or hardship which are urged by the petitioners.
>
> There are paramount considerations affecting the government of Canada and the general public interest which demand attention, and, whatever may have been said as to the propriety of recommendations for the disallowance of legislation which is thought to be unfair, unreasonable or unjust, it has, whenever the occasion presented itself, been maintained by the Ministers of Justice, and has never been successfully controverted by any province, that disallowance is the appropriate remedy for the maintenance of that harmony which it is essential should exist between provincial legislation and the administration of Dominion affairs within their proper domain (*a*).

As to the statutes beyond the enacting authority of the legislature, Mr. Lapointe's early reports followed the now well established practice of recommending that in general the question of their validity could more conveniently and satisfactorily be determined by the Courts. We shall see later to what extent he considered that this principle admitted of exception.

The reports of the Honourable Hugh Guthrie, Minister of Justice during the Conservative administration of the early 1930's, are not sufficiently explicit to indicate with precision the attitude he took regarding the veto power of the Governor General. His views with respect to *ultra vires* Acts are clear, however; in common with his predecessors in office for many years, he felt that the courts were in a better position than His Excellency in Council to pass judgment upon the validity of such statutes. His reports also indicate that in a proper case he would have been prepared to recommend the annulment of a provincial statute as being in contravention of Federal policies or interests. Concerning the propriety of exercising the power because of injustice or discrimination, there is nothing in his reports, and what other evidence there is of his views on the point is not consistent. In 1923, while discussing the MacNeil Act, he advanced the view that Acts strictly within provincial jurisdiction should not be disallowed (*b*); but, speaking before the Canadian Bar Association in 1933, he affirmed that a provincial statute might properly be disallowed "as being opposed to principles of good legislation" (*c*).

With the return of the Mackenzie King Government in 1935, the Honourable Ernest Lapointe again became Minister of Justice. No longer inhibited by the statements of Sir Lomer Gouin, he was now free to air his opinions respecting the circumstances when the power of disallowance might properly be exercised. His opportunity came on March 30, 1936,

(*a*) Report of the Minister of Justice dated the 2nd day of February, 1924; P.C. 701 and P.C. 702, both dated the 29th day of April, 1924.

(*b*) Debates of the House of Commons, 1923, Vol. III, p. 2385.

(*c*) Proceedings of Canadian Bar Association, Vol. 18, 1933, pp. 3-4.

when, in submitting his report upon "The Power Commission Act, 1935" of Ontario, he set out what he believed to be the guiding principles as follows:

> (1) With regard to the allegation that the said Act is *ultra vires* the Legislature of the Province, the undersigned is of opinion that this allegation, if well founded, would not constitute a sufficient ground for disallowance. There are cases in the earlier years of Confederation in which Acts were disallowed on the ground that they were *ultra vires*, but the more modern view is that if the Act be questionable only as to its validity and not on the ground that it interferes with any Dominion policy or interest, the question of its validity should be left to the determination of the courts. To disallow a provincial statute solely upon the ground that it is *ultra vires* would be to subject the provinces to the findings of the law officers of the Crown upon the questions of law involved and deprive them of the right to have such questions judicially determined...
>
> (2) With regard to the allegation that the said Act if permitted to go into operation will adversely affect the interests of the Dominion generally, the undersigned has given very serious and careful consideration to this aspect of the matter, as, in his judgment, it is this aspect which squarely raises the question whether the Act is a fit subject for the exercise of the power of disallowance..."

He then went on to say that while it was alleged that the Act would be contrary to the interests of the Dominion generally, he did not deem it necessary to discuss the wisdom or otherwise of such criticism, because it seemed to him that if any remedy were needed it would have to be found apart from the disallowance of the Act, for no one could say at the time what would be the effect of disallowance upon the many transactions, negotiations and proceedings that had gone on since the passage of the Act. "Disallowance would therefore create further confusion and would result in nothing constructive". In other words, he considered it constitutionally proper to annul provincial enactments contrary to Dominion policies or interests, but he was not prepared to advise the exercise of the veto unless he was convinced that this course would effect the desired result.

Then, directing his attention to that part of the petition praying that the Act be disallowed because of the hardships it would perpetrate, he asserted in the following passage his adherence to the principles enunciated by Sir Allen Aylesworth:

> With regard to the allegation that the legislation is unjust, oppressive and discriminatory and is an invasion and encroachment upon the prerogative rights of the Crown, the undersigned does not understand the reference in this connection to the prerogative rights of the Crown, but so far as concerns the allegation that the legislation is unjust, oppressive and discriminatory he thinks it sufficient to direct the attention of Your Excellency in Council to the report of the Honourable A. B. Aylesworth, then Minister of Justice, ...dated the 21st April, 1908, dealing with an Ontario Act entitled "An Act respecting Cobalt Lake and Kerr Lake"... (which) deals fully with the principles which are now followed in dealing with applications for disallowance of a statute on the ground that it is unjust, oppressive, confiscatory, or constitutes an interference with vested rights or is in conflict with recognized legal principles (*d*).

(*d*) Report of the Minister of Justice dated the 30th day of March, 1936; P.C. 777, dated the 31st day of March, 1936; part of this report is quoted by Mr. Lapointe in Debates of the House of Commons, 1938, Vol. I, p. 177.

This Minister of Justice believed that the Governor General should not intervene to prevent the operation of a local enactment unless it constituted a glaring invasion of the Dominion Parliament's legislative sphere or a serious interference with its policies or interests. His belief that the Federal Government should only interfere in a most extraordinary case can be demonstrated by reference to a speech in the House of Commons on March 30, 1937, in the course of which he asserted:

> For many years the power of disallowance has not been resorted to by the government of Canada. The same power of disallowance existed in connection with federal legislation in the hands of His Majesty the King, represented of course by the imperial government. That power has not been exercised, for many years. In fact at the imperial conference of 1926, and later in 1930, it was formally declared that this power no longer constitutionally exists, and that the imperial parliament has no constitutional right to disallow laws of the parliament of a dominion.
>
> I would not say the same condition would apply to provincial legislation, but it has often been stated by the courts that within the sphere of their own jurisdiction the provincial legislatures are sovereign. I do not think that in a federation such as this the power of disallowance could easily be exercised by the central government. I believe the provincial legislatures feel that they are still supreme and sovereign within the sphere of their jurisdiction (*e*).

Cases demanding the exercise of this extraordinary power were not long in coming, however. About this time the Province of Alberta enacted a series of statutes for the purpose of setting up a system of Social Credit within the province. These were found highly objectionable by the Federal Government because they constituted a clear attempt to regulate banks and banking, matters exclusively assigned to the Federal Parliament. The statutes had the effect of vesting in provincial institutions the absolute power to fix the terms upon and the manner in which Dominion institutions should perform their functions in Alberta. The three most obnoxious of these statutes were quickly annulled by the Governor General in Council pursuant to Mr. Lapointe's report of August 10, 1937, the general tenor of which is expressed in the following passage:

> To Parliament the British North America Act thus confided powers to establish and regulate the monetary system of Canada and the powers thus assigned are exclusive and paramount and the Provincial legislatures are wholly without authority to interfere with the exercise of such powers.
>
> The statutes of Alberta in question constitute an unmistakable invasion of the legislative field thus assigned to Parliament. They conflict with Dominion laws and virtually supplant Dominion institutions designed by Parliament to facilitate the trade and commerce of the whole Dominion.
>
> Owing to the vagueness of the terms of the legislation and the arbitrary powers vested in bodies responsible only to the Government of Alberta, the effect will be to produce confusion and injury to the public interest of Canada, if these statutes are left to take effect according to their terms.
>
> While the undersigned is of opinion that no project or policy of a Provincial legislature should be interfered with by exercise of the power of disallowance merely on the ground that measures to promote such project or policy are of doubtful constitutional validity, a distinction is to be made where the legislature deliberately attempts to interfere with the operation of Dominion laws and to substitute laws and institutions of its

(*e*) Debates of House of Commons, 1937, Vol. III, p. 2294.

own for those legitimately enacted and organized by Parliament and this is particularly true where the legislature has denied recourse to the courts of justice (*f*).

Three other statutes forming part of this series were reserved by the Lieutenant-Governor, and these, having been submitted to the Supreme Court of Canada, were declared *ultra vires*. In addition, as we have seen, that Court also upheld the right of the Governor General to disallow statutes and that of a Lieutenant-Governor to reserve bills. The attempt to establish Social Credit in the province therefore failed.

The Alberta Legislature now sought other means "to create a new economic era" in the province, and a new scheme of legislation was initiated. The scheme provided for a general clearance of mortgage debts in the province. Proceedings by such creditors as chartered banks, insurance companies and other Dominion companies were so curtailed as to deprive them of all legal remedies. The depositors, and holders of policies, shares and debentures of these companies had, of course, to bear the burden cast upon the companies, and most of these persons lived outside the province. It was the same persons who, in the end, had to bear the burden of the heavy taxes imposed on mortgages held by these Dominion companies. The scheme was, therefore, one of debt repudiation aimed at relieving Albertans at the expense of Canadians living in other parts of the country. Had it not been interfered with by the Governor General in Council, many Dominion companies would have been forced to discontinue operations, a number of such companies having already suffered severe losses. Particularly hard hit were insurance companies, for the scheme tended to shake the confidence of Canadians in life insurance and to interfere with the invisible export of that commodity. Some of the statutes forming part of the scheme conflicted with Federal legislation; others were in pith and substance matters exclusively assigned to the Dominion Parliament. Finally, among other objectionable features of the scheme, it was found to interfere with the administration of at least one Federal department. It was these reasons that actuated Mr. Lapointe in recommending the disallowance of "The Home Owners' Security Act" and "The 1938 Securities Tax Act", the two statutes constituting "the central part of the scheme of oppression and repudiation". The following extract from his report of June 13, 1938, sets out the Minister's views on these statutes:

> These enactments are unjust in that they confiscate the property of one group of persons for another group; they authorize and encourage repudiation by debtors regardless of their ability to pay their debts. They discriminate in that they seek to relieve Albertans at the expense of Canadians generally. They impose such a burden on Dominion corporations as will drive them out of Alberta, thus depriving Canadian citizens in Alberta of the services rendered by such corporations. If allowed to operate they will injure public and private credit in Canada.
>
> It is one of the cardinal principles of the Act of Confederation that the Provincial legislatures should be confined in the exercise of their sovereign legislative powers to the enactment of laws, provincial or local, in their operation and objects. The provinces may legislate in relation to "Direct Taxation within the Province..." i.e., taxation which shall not directly or

(*f*) Report of the Minister of Justice dated the 10th day of August, 1937; P.C. 1985 and P.C. 1986, both dated the 17th day of August, 1937; this excerpt is quoted by Mr. Lapointe in Debates of the House of Commons, 1938, Vol. I, p. 178.

> indirectly bear upon persons outside the province; "Property and Civil Rights in the Province"; "The Incorporation of Companies with Provincial Objects" and "Matters of a merely local or private Nature in the Province". The legislature of Alberta has not, in the opinion of the undersigned, in enacting these statutes, engaged itself genuinely and in good faith in the legislative field thus assigned to it by the British North America Act, but on the contrary, has deliberately legislated in a manner injurious to the public interest of Canada and contrary to the clear intention of the Act of Confederation (*g*).

It should not be assumed from the opening words of this excerpt that the Minister had altered his views regarding the impropriety of disallowing statutes because of injustice. The injustices to which he referred in his report were perpetrated against Canadians in all provinces in order to benefit residents of Alberta. It could not seriously be pretended that the matter was simply a local or private one. That this is the proper interpretation is evident, not only from a consideration of the report as a whole, but also from the Minister's remarks addressed to the House of Commons a few months previous in justifying his course of action in regard to the Ontario Hydro Electric Act and the Acts of Alberta that had been disallowed the preceding year. This is what he said at the time (February 4, 1938):

> As I said last year, touching the question of unfairness or injustice, I share on this point the views expressed by Sir Allen Aylesworth when he was minister of justice. It is for the electors of the province to decide whether the legislation is unfair or unjust and to vote against the government that enacts such legislation (*h*).

Consistent with this view are his observations in his report of July 5, 1938, on the "Padlock Law" of the Province of Quebec. Under that Act, the Attorney General of the province is given power to order the closing, for a period of one year, of any house "upon satisfactory proof" that it is used for propagating "communism" or "bolshevism" (terms that are not defined), and the only provision in the nature of an appeal requires that a person whose house in closed prove his innocence. The Act aroused considerable controversy and many protests were directed to the Federal authorities against it including a petition attacking the legislation on the grounds that it constituted a clear invasion of the legislative sphere of Parliament and was destructive of elementary principles and processes of British constitutional government in that it overthrew freedom of speech and of the press and other civil liberties and denied recourse to the courts. In his report upon this Act and petition, the Minister set out at length the circumstances which in his opinion would justify the exercise of the power. Having first observed that in point of law the Governor General's authority in this regard is unrestricted within the prescribed period of one year, he continued:

> The precedents in respect of the exercise of the power, during recent decades, nevertheless disclose a principle of fairly uniform application by which Your Excellency in Council in the exercise of the power, has been influenced and guided. The principle is manifested by a definite reluctance

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(*g*) Report of the Minister of Justice dated the 13th day of June, 1938; P.C. 1367 and P.C. 1368, both dated the 15th day of June, 1938.

(*h*) Debates of the House of Commons, 1938, Vol. I, pp. 177-8.

on the part of Ministers of Justice to recommend disallowance of provincial legislation merely on the ground of its being allegedly *ultra vires* of the provincial legislature, except when such legislation involves,—

(*a*) a clear and palpable attempt to invade the legislative field of the Dominion Parliament...;

(*b*) injurious interference with Dominion property, interests or policies...; or

(*c*) conflict with Imperial interests or Dominion treaty obligations...

Then, after stating that this principle appeared to rest upon the considerations that questions respecting the enacting power of the legislature may be more conveniently and satisfactorily determined by the courts, that the legislature in acting within its legislative powers is strictly responsible for the policy, merits and justice of its legislation and that the Governor General's control over provincial legislation may not constitutionally be exercised upon the principle of substituting the judgment of the Dominion Executive for that of the local legislatures in relation to matters that are strictly confined to the field of local self-government, he went on to deal specifically with the Act in question:

As to the policy of the measure, the undersigned is disposed to adhere to and to reaffirm the opinion his predecessors in office have repeatedly expressed and upon which their recommendations, duly approved by Your Excellency in Council, have proceeded, namely, that if the measure complained of be not open to objection upon any of the scores herein above indicated, and assuming it to be otherwise *intra vires* of the Provincial Legislature, Your Excellency in Council cannot appropriately exercise the power of disallowance upon a footing which would require Your Excellency in Council, in opposition to fundamental principles of local autonomy, to pass judgment upon the wisdom or propriety of a measure passed by the local legislature in the competent exercise of its assigned legislative powers, and for which it is responsible to its political judges, the electors of the Province...

The remaining question concerns the constitutional validity of the measure. Is the said Act *intra vires* or *ultra vires* of the Legislature of the Province? The petitioners question the validity of the Act broadly on two grounds: first, it is alleged that the Act overthrows fundamental civil liberties, in particular freedom of speech, of the press and of public meeting, and invades in these respects the legislative field of the Dominion Parliament. Secondly, the petitioners contend that the Padlock Act, by purporting to create a new, though undefined, crime and to provide a penalty for it, invades the exclusive legislative jurisdiction of the Dominion Parliament in relation to Criminal Law.

Each of these submissions raises a constitutional question which is not free from difficulty; but as the legislation in question does not fall within the criticism of any one of the three cases referred to above in which the propriety of the exercise of the power of disallowance is recognized and confirmed by a stream of precedents, the undersigned refrains from expressing any opinion upon the constitutional question so raised. In accordance with the practice of his predecessors in office in regard to questions of a similar nature, the undersigned considers that the questions so raised affecting the validity of the Act may be more conveniently and satisfactorily determined by the Courts than by Your Excellency in Council upon the recommendation of the undersigned; therefore he would not recommend disallowance upon the ground that the Act is constitutionally invalid (*i*).

(*i*) Report of the Minister of Justice dated the 5th day of July 1938; P.C. 1578 dated the 6th day of July, 1938.

In March, 1939, another Alberta Act, "An Act to amend the Limitation of Actions Act, 1935", which also formed part of the legislative scheme above described, was disallowed on the recommendation of this Minister of Justice (*j*). It having been substantilaly re-enacted a little later, it was again disallowed (*k*).

Further legislation forming " 'part and parcel' of the unconstitutional scheme of debt repudiation" received similar treatment at the hands of Mr. Lapointe's successor, the present Prime Minister of Canada, in 1942, the statutes disallowed at this time being "The Debt Proceedings Suspension Act, 1941", "The Orderly Payment of Land Debts Act" and the "Limitation of Actions Act, 1935, Amendment Act, 1941" (*l*).

The last Act disallowed by the Governor General was also annulled on the recommendation of Mr. St. Laurent. This was an Act of Alberta entitled "An Act to prohibit the Sale of Land to any Enemy Aliens and Hutterites for the Duration of the War", which was disallowed because it came in conflict with validly enacted Federal regulations and because the Minister was, in the words of the report, "of opinion that the rights and obligations of enemy aliens and who are to be regarded as such should, in wartime, be dealt with exclusively by Federal authority" (*m*). It was the twelfth statute disallowed during this period and the one hundred and twelfth since Confederation (*n*).

(*j*) P.C. 676 and P.C. 677, both dated the 25th day of March, 1939.

(*k*) P.C. 2949 and P.C. 2950, both dated the 4th day of October, 1939.

(*l*) Report of the Minister of Justice attached to P.C. 2350; P.C. 2350 and 2351, both dated the 27th day of March, 1942.

(*m*) Report of the Minister of Justice dated the 6th day of April, 1943; P.C. 2819 and P.C. 2820, both dated the 7th day of April, 1943.

(*n*) See Appendix A.

Appendix A

TABLE OF DISALLOWED STATUTES 1867-1954

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
31 Vict., 1868, c. 21 (N.S.).	An Act to empower the Police Court in the City of Halifax to sentence Juvenile Offenders to the Halifax Industrial School.	Act deals with criminal law which appertains to Dominion Parliament and is thus clearly *ultra vires*.	12 Aug., 1869	472
32 Vict., 1868-69, c. 1 (Ont.).	An Act for Granting to Her Majesty certain sums of money required for Defraying the Expenses of Civil Government for the year 1869; for making good certain sums Expended for the Public Service in 1868, and for other Purposes.	6th section objectionable, not being within competence of legislature as infringing on jurisdiction of Parliament of Canada to fix and provide for judges' salaries.	14 July, 1869 22 Oct., 1869 19 Jan., 1870	83 91 93
32 Vict., 1868-69, c. 3 (Ont.).	An Act to define the Privileges, Immunities and Powers of the Legislative Assembly, and to give Summary Protection to Persons Employed in the Publication of Sessional Papers.	Not within competence of the legislature. Legislature's powers are strictly limited to those conferred by ss. 92 to 95, B.N.A. Act.	14 July, 1869 22 Oct., 1869 24 Nov., 1869	83 91 92
32 Vict., 1869, c. 4, (P.Q.).	An Act to define the privileges, immunities and powers of the Legislative Council and Legislative Assembly of Quebec, and to give summary protection to persons employed in the publication of parliamentary papers.	Not within competence of the legislature. Legislature's powers are strictly limited to those conferred by ss. 92 to 95, B.N.A. Act.	3 Nov., 1869 24 Nov., 1869	254 255
34 Vict., 1871, c. 32, (N.S.).	An Act to regulate Pilotage in the Bras d'Or Lakes in the Island of Cape Breton.	Legislature has no power to regulate fees of pilots as that can only be done by Dominion Government.	6 Dec., 1871	476
36 Vict., 1872-73, c. 2 (B.C.)	An Act to authorize one Justice of the Peace to do any act, matter or thing heretofore to be done by two Justices of the Peace, and to give an Appeal to Courts of General or Quarter Sessions.	The Act is legislation respecting law of criminal procedure which appertains solely to Dominion Parliament.	9 Mar., 1874	1023
36 Vict., 1873, c. 2, (Man.).	An Act to define the Privileges, Immunities and Powers of the Legislative Council and of the Legislative Assembly of Manitoba, and to give	Act not within competence of provincial legislature as being inconsistent with ss. 92 and 96 of the B.N.A. Act.	21 Aug., 1874	780

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
	summary protection to persons employed in the publication of Sessional Papers.			
36 Vict., 1873, c. 32 (Man.).	An Act to Incorporate the Winnipeg Board of Trade.	Incorporation of boards of trade not being for provincial objects only, but treating of trade and commerce, is within competence of Parliament of Canada alone.	1 Sept., 1874	781
37 Vict., 1873-74, c. 2 (B.C.).	An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia.	Act tends to deal with lands which are assumed to be the actual property of the province, assumption completly ignoring as applicable to Indians of British Columbia the honour and good faith with which the Crown has always dealt with its Indian tribes. Further, s. 109 of the B.N.A. Act provides that all lands in province belong to the Province subject to any trust in respect thereof.	19 Jan., 1875 11 Mar., 1875	1024 1029
37 Vict., 1873-74, c. 9 (B.C.).	An Act to make provision for the better administration of Justice.	Provision of Act authorizing the Lieutenant-Governor to appoint places where County Court Judges shall reside is practically assuming a power of appointment of judges.	9 Mar., 1875	1032
37 Vict., 1874, c. 8 (Ont.).	An Act to amend the Law respecting Escheats and Forfeitures.	Not within competence of legislature as escheat is a matter of prerogative with which provincial legislatures have no power to deal.	18 Nov., 1874 26 Mar., 1875	110 119
37 Vict., 1874, c. 74 (N.S.).	An Act to incorporate "The Halifax Company, Limited".	Incorporation of the company is for objects beyond the power and control of the legislature.	4 Dec., 1874	479
37 Vict., 1874, c. 82 (N.S.).	An Act to incorporate the Eastern Steamship Company.	Not within competence of provincial legislature as dealing with subjects mentioned in B.N.A. Act, s. 92, subs. (10), clause (*a*).	25 Mar., 1875	488
37 Vict., 1874, c. 83 (N.S.).	An Act to incorporate the Anglo-French Steamship Company.	Not within competence of legislature as dealing with subjects mentioned in B.N.A. Act, s. 92, subs. (10), clauses (*a*) and (*b*).	4 Dec., 1874	480

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
38 Vict., 1874-75, c. 47 (P.Q.).	An Act to incorporate the "St. Lawrence Bridge Company".	Importance of preserving navigation of River St. Lawrence. A bill on similar matter introduced at last session of Canadian Parliament but after investigation not proceeded with.	16 Oct., 1876	261
38 Vict., 1875, c. 12 (Man.).	An Act to regulate proceedings against and by the Crown.	Act is so general in terms that it might be held to apply to claims against Dominion government. In Manitoba serious consequence might issue, as bulk of lands belong to Canada and are still ungranted.	25 May, 1876	796
38 Vict., 1875, c. 18 (Man.).	An Act respecting Estreats, Fines, Penalties, and Forfeitures.	Act deals with matters beyond competence of provincial legislature. Subject of Act is on whole a matter of criminal procedure, and Act deals with many matters within exclusive competence of the Parliament of Canada.	5 Aug., 1876	799
38 Vict., 1875, c. 33 (Man.).	An Act to afford facilities for the construction of a Bridge over the Assiniboine River between the City of Winnipeg and St. Boniface West.	River being navigable any authority required for bridging the Assiniboine River, at any point east of Portage la Prairie, should be obtained from the Dominion Government.	7 Oct., 1876	804
38 Vict., 1875, c. 37 (Man.).	An Act to amend Cap. 46 Vict. 37, intituled: The Half-breed Land Grant Protection Act.	Act was not to advantage of half-breeds. No notice of passage of Act was given in Manitoba Gazette for 3 months as required, and same was not considered in force in province.	7 Oct., 1876	804
38 Vict., 1875, c. 6 (B.C.).	An Act to make provision for the better Administration of Justice.	If Act allowed to go into operation, consequence would be to permit Lieutenant-Governor in Council to arrange boundaries of County Court Districts or to alter them at pleasure; such alterations as result in appointment by local government of a County Court Judge to a new district or Judgeship thus transferring to local government part of power of appointment of judges which is vested in the	13 Oct., 1875 28 Apr., 1876	1037 1038

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		Governor General. Province concurred in disallowance.		
40 Vict., 1877, c. 22 (B.C.).	An Act to provide for the better Administration of Justice.	Enactment in s. 27 providing that present incumbents of County Court Bench should not be removed except on terms mentioned for the purpose of appointing professional men is *ultra vires* of legislature as it assumes to limit power of Dominion Government in respect of retirement or removal of officers appointed, paid by and holding office during pleasure of Government of Canada.	21 Feb., 1878 15 May, 1878	1054 1057
40 Vict., 1877, c. 32 (B.C.).	An Act to incorporate the Alexandra Company, Limited.	Incorporation is for objects beyond power and control of provincial legislation, as being for other than provincial objects and coming within exception mentioned in 10th subs. of s. 92, B.N.A. Act.	29 Sept., 1877 15 May, 1878	1045 1057
40 Vict., 1877, c. 33 (B.C.).	An Act to incorporate the British Columbia Insurance Company, Limited.	Powers conferred by Act appear to be too wide, as the company is in effect authorized to do a universal insurance business. Same reasons as 40 Vict., c. 32. Also deals with interest.	29 Sept., 1877 15 May, 1878	1045 1057
41-42 Vict., 1878, c. 25 (B.C.).	An Act relating to Crown Lands in British Columbia.	Act attempts to deal with the question of interest, a subject assigned exclusively to Parliament of Canada by the B.N.A. Act.	15 Aug., 1879	1065
41-42 Vict. 1878, c. 35 (B.C.).	An Act to provide for the better collection of Provincial Taxes from Chinese.	Act declared by Supreme Court of British Columbia to be unconstitutional and void, and the Dominion Government cannot allow Act so declared to remain on the statute book.	15 Aug., 1879	1065
41-42 Vict., 1878, c. 37 (B.C.).	An Act to amend the "Cariboo Waggon Road Tolls Act, 1876".	Act is interference with the regulation of trade and commerce and the possible imposition, under its provisions, of unfair charges upon the Dominion Exchequer.	24 Sept., 1879	1068

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
42 Vict., 1879, c. 19 (Ont.).	An Act respecting the Administration of Justice in the Northerly and Westerly parts of Ontario.	Assumes to provide for administration of justice over territory, the right of province to which is not admitted, as boundaries are not settled. Act encroaches on powers of Dominion Government to appoint judges.	20 Jan., 1880 17 Mar., 1880	161 168
43 Vict., 1880, c. 28 (B.C.).	An Act to amend the "Cariboo Waggon Road Tolls Act, 1876".	Act is interference with the regulation of trade and commerce and the possible imposition, under its provisions, of unfair charges upon the Dominion Exchequer.	27 July, 1881	1078
43 Vict., 1880, c. 29 (B.C.).	An Act respecting Tolls on the Cariboo Waggon Road.	Act is interference with the regulation of trade and commerce; possible imposition under its provisions of unfair charges upon the Dominion Exchequer.	27 July, 1881	1078
44 Vict., 1881, c. 11 (Ont.).	An Act for Protecting the Public Interest in Rivers, Streams and Creeks.	Power of legislature to take away rights of one, and vest them in another is doubtful. Devolves upon Government to see that such power is not exercised in flagrant violation of private rights and natural justice. Act is retroactive and overrides a decision of court of competent jurisdiction.	17 May, 1881	177
44 Vict., 1881, c. 37 (Man.).	An Act to incorporate the Winnipeg South-Eastern Railway Company.	Doubt existing as to power of a provincial legislature to authorize construction of railway extending beyond limits of the province, as trenching on B.N.A Act, s. 92, subs. (10), clause (a). Act conflicts with settled policy of Dominion as evidenced by the clause in contract with Canadian Pacific Railway No. 15, ratified and confirmed by Parliament.	4 Jan., 1882	827
44 Vict., 1881, c. 38 (Man.).	An Act to incorporate the Manitoba Tramway Company.	Act conflicts with policy of the Government, ratified by Parliament, to prevent diversion of traffic of Northwest Territories, to railway system of United States, and to	31 Oct., 1882	828

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		endeavour by all means possible to secure it to Canadian railways.		
44 Vict., 1881, c. 39 (Man.).	An Act to incorporate the Emerson and Northwestern Railway Company.	Act conflicts with policy of the Government, ratified by Parliament, to prevent diversion of traffic of Northwest Territories, to railway system of United States, and to endeavour by all means possible to secure it to Canadian railways.	31 Oct., 1882	828
45 Vict., 1882, c. 14 (Ont.).	An Act for Protecting the public Interest in Rivers, Streams and Creeks.	Act is the same as c. 11, 1881, previously disallowed.	20 Sept., 1882	188
45 Vict., 1882, c. 69 (N.B.).	An Act to incorporate the Fredericton and St. Mary's Bridge Company.	Bridge could not be constructed without interfering with the navigation of the river. Provincial legislature has no power to authorize this interference; Parliament of Canada can alone authorize this.	13 Feb., 1883 20 July, 1883	731 732
45 Vict., 1882, c. 8 (B.C.).	An Act to Consolidate and Amend the Laws relating to Gold and other Minerals excepting Coal.	Appointment of Gold Commissioner as a judge performing judicial functions is, in effect, an appointment of a judge by Lieutenant-Governor instead of by Governor General in Council as provided by B.N.A. Act.	8 May, 1883	1080
45 Vict., 1882, c. 30 (Man.).	An Act to encourage the Building of Railways in Manitoba.	Act conflicts with policy of the Government, ratified by Parliament, to prevent diversion of traffic of Northwest Territories to railway system of United States, and to endeavour by all means possible to secure it to Canadian railways. Act is also capable of being used to contravene the terms in regard to Canadian Pacific Railway upon which the boundaries of Manitoba were enlarged.	31 Oct., 1882	828
46 Vict., 1882-83, c. 10 (Ont.)	An Act for protecting the Public Interest in Rivers, Streams and Creeks.	Act is same as c. 11, 1881 and c. 14, 1882 previously disallowed.	13 Mar., 1883	192

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
46 Vict., 1883, c. 26 (B.C.).	An Act to incorporate the Fraser River Railway Company.	Act possibly beyond power of provincial legislature as trenching on exception made by clause (a) of 10th subs. of s. 92 of B.N.A. Act. Objects of company contrary to legislation of Parliament and settled policy of country respecting Canadian Pacific Railway. If railway constructed, it will direct trade from Canada to the United States and from the Canadian to the United States system of railways.	25 Sept., 1883	1082
46 Vict., 1883, c. 27 (B.C.).	An Act to incorporate the "New Westminster Southern Railway Company".	Act possibly beyond power of provincial legislature as trenching on exception made by clause (a) of 10th subs. of s. 92 of B.N.A. Act. Objects of company contrary to legislation of Parliament and settled policy of country respecting Canadian Pacific Railway. If railway constructed, it will direct trade from Canada to the United States and from the Canadian to the United States system of railways.	25 Sept., 1883	1082
47 Vict., 1884, c. 35 (Ont.).	An Act respecting License Duties.	Object of Act is to render Liquor License Act, 1883, inoperative by imposing heavy and cumulative tax on persons taking out licenses. Duty of Government to protect those obeying laws of Parliament.	29 Apr., 1884	194
47 Vict., 1884, c. 3 (B.C.).	An Act to prevent the Immigration of Chinese.	Act discriminates against Chinese. Imposes great penalties upon Chinese coming into British Columbia. Act cannot be said to be of a local or private nature as it involves Dominion and possibly Imperial interests. Authority of provincial legislature to pass the Act is very doubtful.	7 Apr., 1884	1092
47 Vict., 1884, c. 26 (Man.).	An Act respecting Escheats and Forfeitures, and Estates of Intestate.	Decision in *Attorney General of Ontario v. Mercer* not applicable to Manitoba. At date of transfer	25 Aug., 1885	838

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		of Province to Canada, all ungranted or waste lands in province were vested in Crown and were administered by Government of Canada for purposes of Dominion. S. 109 of B.N.A. Act not applicable to province.		
47 Vict., 1884, c. 68 (Man.).	An Act to incorporate the "Emerson and Northwestern Railway Company".	Apprehension that the Company will be able to divert trade from the Canadian system of railways to the railways of the United States.	25 Feb., 1886	841
47 Vict., 1884, c. 70 (Man.).	An Act to amend an "Act to incorporate the Manitoba Central Railway Company" and amending Acts.	Apprehension that the Company will be able to divert trade from the Canadian system of railways to the railways of the United States.	25 Feb., 1886	841
48 Vict., 1885, c. 2 (Man.).	An Act respecting the Lieutenant-Governor and his deputies.	Act not within competence of provincial legislature, as legislative authority of provincial legislature, with respect to Lieutenant-Governor, is excepted by 1st clause of s. 92, B.N.A. Act.	10 Jan., 1887	851
48 Vict., 1885, c. 45 (Man.).	An Act to incorporate the Rock Lake, Souris Valley and Brandon Railway Company.	Act within competence of provincial legislature, but it affects general policy of Government to prevent diversion of traffic from Canadian to the United States system of railways.	10 Jan., 1887	850
48 Vict., 1885, c. 9 (B.C.).	An Act to amend the "Sumas Dyking Act, 1878".	Provisions of Act are in conflict with the grant of a railway belt to the Dominion Government by the Act, 47 Vict., c. 14 of British Columbia.	11 Mar., 1886	1096
48 Vict., 1885, c. 13 (B.C.).	An Act to prevent the Immigration of Chinese.	Act is interference with power of Parliament to regulate trade and commerce. Ordinary tribunals can afford no adequate remedy for or protection against injuries resulting from allowing Act to go into operation.	26 Mar., 1886	1099
48 Vict., 1885, c. 16 (B.C.).	An Act to amend the "Land Act, 1884".	Questions as to validity of grants made by government of British Columbia are before the courts.	11 Mar., 1886	1103

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		Pending a decision, no Act of legislature should be left to its operation which should have effect of confirming grants so called in question. Act might have effect of confirming sales of land in railway belt to prejudice of Dominion under an earlier statute.		
49-50 Vict., 1886, c. 98, (P.Q.).	An Act respecting the Executive power.	Not within competence of legislature as provisions of Act withdrawn from provincial legislative authority by s. 92 of B.N.A. Act.	22 Mar., 1887 16 July, 1887	313 338
49 Vict., 1886, c. 56 (N.S.).	An Act concerning the collection of freight, wharfage and warehouse charges.	Beyond competence legislature as, by B.N.A. Act, s. 91, Parliament of Canada has jurisdiction respecting navigation, shipping and trade and commerce.	30 Mar., 1887	558
50 Vict., 1887, c. 7 (B.C.).	An Act to establish a Court of Appeal from The Summary Decisions of Magistrates.	Act at variance with provisions of s. 91 of B.N.A. Act, being legislation affecting procedure in criminal maters; also at variance with s. 76 of Summary Convictions Act.	10 Apr., 1888	1108
50 Vict., 1887, c. 1 (Man.).	An Act to incorporate the Manitoba Central Railway Company.	Act conflicts with policy of Government, which is designed to prevent diversion of traffic from Canadian to the United States system of railways, and violates essential conditions of stipulations with Canadian Pacific Railway.	5 Aug., 1887	857
50 Vict., 1887, c. 2 (Man.).	An Act to incorporate the Winnipeg and Southern Railway Company.	Act conflicts with policy of Government, which is designed to prevent diversion of traffic from Canadian to the United States system of railways, and violates essential conditions of stipulations with Canadian Pacific Railway.	5 Aug., 1887	857
50 Vict., 1887, c. 4 (Man.).	An Act respecting the construction of the "Red River Valley Railway".	Act conflicts with policy of Government, which is designed to prevent diversion of traffic from Canadian to the United States system of rail-	4 July, 1887	855

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		ways, and violates essential conditions of stipulations with Canadian Pacific Railway. Act also provides for appropriation of public lands; public lands in Manitoba for the most part vested in Dominion and therefore beyond competence of province to enact this.		
50 Vict., 1887, c. 28 (Man.).	An Act for further improving the Law.	Immunity from responsibility and liability for their acts given to contractors and persons employed in construction of public works, or doing work under Minister of Public Works or Commissioner of Railways in Manitoba, is of very unusual and extraordinary character, and constitutes manifest interference with private rights.	14 July, 1887	856
50 Vict., 1887, c. 47 (Man.).	An Act to amend "The Public Works Act of Manitoba".	Under this Act, railways could be constructed by Minister of Public Works as a public work of Manitoba. Act therefore in conflict with policy of Government respecting construction of railways in Manitoba. Act also provides for appropriation of public lands; public lands in Manitoba for the most part vested in Dominion and therefore beyond competence of province to enact this.	4 July, 1887	855
50 Vict., 1887, c. 61 (Man.).	An Act to Incorporate the Emerson and North-Western Railway Company.	Act conflicts with policy of Government to prevent diversion of traffic from Canadian system to the United States system of railways and violates essential conditions of stipulation with Canadian Pacific Railway.	5 Aug., 1887	857
51-52 Vict., 1888, c. 20 (P.Q.).	An Act to amend the law respecting District Magistrates.	Act not within competence of legislature as power to appoint judges is conferred on Governor General by s. 96 of B.N.A. Act.	3 Sept., 1888 18 Jan., 1889 15 July, 1889	345 354 371

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
52 Vict., 1889, c. 30 (P.Q.).	An Act to amend the law respecting district magistrates.	Act substantially the same as c. 20, 1888 previously disallowed.	21 June, 1889	430
52 Vict., 1889, c. 45 (Man.).	An Act to further amend Chapter Fifty-two of Forty-nine Victoria, being the Manitoba Municipal Act, 1886, and amendments.	Imposition of additional percentage on taxes in arrears is *ultra vires* of legislature as it is legislation respecting interest, which, by s. 91, Art. 19, B.N.A. Act, is within jurisdiction of Dominion Parliament. Province could not extend its jurisdiction by legislating that court had no jurisdiction in the matter.	1 Mar., 1890	910
53 Vict., 1890, c. 23 (Man.).	An Act to Authorize Companies, Institutions or Corporations Incorporated Out of this Province, to Transact Business Therein.	Act is *ultra vires* as referring to companies incorporated by Parliament of United Kingdom or Canada, would hamper Dominion in dealing with Crown lands held by Dominion, would derogate from grants given by Dominion and would diminish the security of the Dominion in lands held by C.P.R. and Hudson's Bay Company.	21 Mar., 1891	941
53 Vict., 1890, c. 31 (Man.).	An Act Respecting the Diseases of Animals.	Act is legislation affecting trade and commerce as well as matters relating to quarantine, both of which are assigned to Parliament by B.N.A. Act and conflicts with existing Dominion legislation.	21 Mar., 1891	946
59 Vict., 1895, c. 4 (Man.).	An Act respecting Corporations Incorporated out of Manitoba.	Act is *ultra vires* as referring to companies incorporated by the Parliament of United Kingdom or Canada, would hamper Dominion in dealing with Crown lands held by Dominion, would derogate from grants given by Dominion and would diminish the security of the Dominion in lands held by C.P.R. and Hudson's Bay Company.	24 Oct., 1895	1005

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
60 Vict., 1897, c. 2 (Man.).	An Act respecting Corporations incorporated out of Manitoba.	Not within competence of legislature in that Act professes to make the obtaining of a license even by a company incorporated by Dominion Parliament in execution of one or more of its special and exclusive powers of legislation a condition of its right to do business in the province, and further the provisions of the Act might very seriously interfere with the proprietary interests of the Dominion within the province.	8 Mar., 1898 1 Apr., 1898	455* 457
61 Vict., 1898, c. 28 (B.C.).	An Act relating to the employment of Chinese or Japanese persons on Works carried on under Franchises granted by Private Acts.	Act affects not only the relations between the Dominion and Japan but also the relations of the Empire with the latter country. Further, power of legislature to enact statutes affecting rights of aliens not free from doubt.	8 Nov., 1898 29 May, 1899	536 555
61 Vict., 1898, c. 44 (B.C.).	An Act to amend the Tramway Incorporation Act.	Act affects not only the relations between the Dominion and Japan but also the relations of the Empire with the latter country. Further, power of legislature to enact statutes affecting rights of aliens not free from doubt.	8 Nov., 1898 29 May, 1899	536 555
62 Vict., 1899, c. 39 (B.C.).	An Act respecting Liquor Licences.	Contains a provision that no licence thereunder shall be issued or transferred to any person of, *inter alia*, Chinese or Japanese race and, therefore, open to same objections as legislation of 1898 affecting Japanese.	14 Nov., 1899 12 Apr., 1900	566 583
62 Vict., 1899, c. 44 (B.C.).	An Act to grant a subsidy to a Railway from Midway to Penticton.	Act provides, under penalty, that no Chinese or Japanese person shall be employed or permitted to work in the construction or operation of any railway subsidized thereunder, and therefore open to the same objections as anti-Japanese legislation of 1898.	14 Nov., 1899 12 Apr., 1900	566 583

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
62 Vict., 1899, c. 46 (B.C.).	An Act to amend the "Coal Mines Regulation Act".	Act contains a provision in effect prohibiting employment of Chinese or Japanese persons and therefore open to same objections as anti-Japanese legislation of 1898.	14 Nov., 1899 12 Apr., 1900	566 583
62 Vict., 1899, c. 50 (B.C.).	An Act to amend the "Placer Mining Act".	Act trenches on exclusive Dominion legislative authority in relation to aliens, and, as regards exclusion of Dominion companies, the regulation of trade and commerce.	14 Nov., 1899 12 Jan., 1900 12 Apr., 1900	566 577 583
63-64 Vict., 1900, c. 47 (Man.).	An Act respecting Real Property in the Province of Manitoba.	Certain provisions of the Act had been found to be embarrassing and vexatious in so far as they applied to Dominion lands in that province.	6 June, 1901 15 July, 1901	465 471
64 Vict., 1900, c. 11 (B.C.).	An Act to Regulate Immigration into British Columbia.	Act inconsistent with the general policy of the Dominion Immigration Act, and where foreign relations involved not desirable that uniformty of immigration laws should be interfered with by special provincial legislation.	5 Jan., 1901 4 Sept., 1901	594 604
64 Vict., 1900, c. 14 (B.C.).	An Act relating to the employment on Works carried on under Franchises granted by Private Acts.	Act solely directed against Asiatics, including Japanese and therefore open to same objections as previous anti-Japanese legislation of 1898 as well as being at variance with policy of Dominion Immigration Act.	5 Jan., 1901 4 Sept., 1901	594 604
1 Edw. VII, 1901, c. 80 (B.C.)	An Act to Incorporate the Lake Bennett Railway.	Territory proposed to be traversed by the line of railway is in dispute between the United States and Canada; doubt as to competence of legislature to authorize construction of this railway to the northern boundary of the province; Act is not considered in public interest or consistent with the policy of Dominion Government.	27 Dec., 1901 3 May, 1902	621 627
2 Edw. VII, 1902, c. 34 (B.C.).	An Act to Regulate Immigration into British Columbia.	Act is the same as c. 11 of 1900, previously disallowed.	14 Nov., 1902	637

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
2 Edw. VII, 1902, c. 38 (B.C.).	An Act relating to the employment on Works carried on under Franchises granted by Private Acts.	Act is same as c. 38, 1900, previously disallowed.	14 Nov., 1902	637
2 Edw. VII, 1902, c. 48 (B.C.).	An Act to further amend the "Coal Mines Regulation Act".	In so far as it affected Japanese as aliens or as naturalized British subjects, the Act is *ultra vires* under decision of Judicial Committee of the Privy Council in *Union Colliery v. Bryden* (1898) A.C. 580, and is also an example of discriminating legislation such as had been on several occasions disallowed as being incompetent to a provincial legislature or upon grounds of public policy.	14 Nov., 1902	637
3 Edw. VII, 1903, c. 12 (B.C.).	An Act to Regulate Immigration into British Columbia.	Act is same as c. 34, 1902, previously disallowed.	1 Oct., 1903	643
3 Edw. VII, 1903, c. 14 (B.C.).	An Act relating to the employment on Works carried on under Franchises granted by Private Acts.	Act is same as c. 38, 1902, previously disallowed.	1 Oct., 1903	643
3 Edw. VII, 1903, c. 17 (B.C.).	An Act to further amend the "Coal Mines Regulation Act".	Act is same as c. 48, 1902, previously disallowed.	1 Oct., 1903	643
3 & 4 Edw. VII, 1903-4, c. 26 (B.C.).	An Act to Regulate Immigration into British Columbia.	Act is essentially of same effect as c. 11, 1900, and similar statutes previously disallowed.	16 Nov., 1904	659
5 Edw. VII, 1905, c. 18 (B.C.).	An Act to amend the "Supreme Court Act".	*Ultra vires* as being an attempt to impose a limitation upon the Governor General's power of selection of judges under s. 96 of the B.N.A. Act.	1 Nov., 1905	679
5 Edw. VII, 1905, c. 28 (B.C.).	An Act to regulate Immigration into British Columbia.	Act is same as Act of 1900 and similar statutes previously disallowed.	19 Apr., 1905 Sept., 1905	664 676
5 Ed. VII, 1905, c. 30 (B.C.).	An Act relating to the employment on Works carried on under Franchises granted by Private Acts.	Act is same as Act of 1900 and similar statutes previously disallowed.	19 Apr., 1905 Sept., 1905	664 676
5 Edw. VII, 1905, c. 36 (B.C.).	An Act further to amend the "Coal Mines Regulation Act."	Act is same as Act of 1900 and similar statutes previously disallowed.	19 Apr., 1905 Sept., 1905	664 676
8 Edw. VII, 1908, c. 23 (B.C.).	An Act to Regulate Immigration into British Columbia.	Substantially same as statutes of same name previously disallowed. Also	19 Nov., 1908	691

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		in so far as it affects Japanese subjects coming into British Columbia, is repugnant to the provisions of the Dominion statute, The Japanese Act, 1907, sanctioning the Convention of Jan. 31, 1906, between the United Kingdom and Japan.		
8 Edw. VII, 1908, c. 42 (Ont.).	An Act to revise and amend The Chartered Accountants Act.	S. 13 is invalid as being in direct conflict with competently enacted Dominion legislation incorporating Dominion Associations of Chartered Accountants.	19 Apr., 1909	89
9 Edw. VII, 1909, c. 43 (Sask.).	An Act to incorporate The Gardner Boggs Investvestment and Trust Company.	Beyond competence of legislature as professing to authorize the company thereby incorporated to carry on its business beyond the limits of the province.	2 Dec., 1910 9 Jan., 1911	783 785
9 Edw. VII, 1910, c. 44 (Sask.).	An Act to incorporate Saskatchewan Securities and Trust Corporation.	Beyond competence of legislature as professing to authorize the Company thereby incorporated to carry on its business beyond the limits of the province.	2 Dec., 1910 9 Jan., 1911	783 785
9 Edw. VII, 1909, c. 45 (Sask.).	An Act to incorporate The Saskatchewan Loan Company.	Beyond competence of legislature as professing to authorize the company thereby incorporated to carry on its business beyond the limits of the province.	2 Dec., 1910 9 Jan., 1911	783 785
10 Edw. VII, 1910, c. 79 (Ont.).	An Act to revise and amend the Chartered Accountants Act.	The British Colonial Office had protested against the injustice done by the Act to members of the English Institute of Chartered Accountants and while regulations under the Act seemed to remedy this, there was no time for further communication with the Colonial Office.	23 Mar., 1911	98
1 Geo. V, 1910, c. 82 (P.Q.).	An Act to amend the charter of General Trust.	Not within competence of legislature because it professes to confer powers which infringe upon the subject of banking and also exceeds the constitutional power of the	12 Jan., 1911 23 May, 1911	256 259

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		legislature to incorporate companies with provincial objects. Also Act gives name indicative of company's operating throughout Canada.		
10 Edw. VII, 1910, c. 82 (Man.).	An Act to Incorporate "The Accident Insurance Company of Manitoba, Limited".	Act professes to authorize company thereby incorporated to carry on business outside of the province in excess of constitutional authority of legislature to incorporate companies with provincial objects and cannot in the public interest be allowed to stand.	7 Dec., 1910 4 Apr., 1911	513 515
7 & 8 Geo. V, 1917, c. 71 (B.C.).	An Act to amend the "Vancouver Island Settlers' Rights Act, 1904".	An invasion of valuable proprietary rights of the Esquimalt and Nanaimo Railway Co. under an agreement sanctioned by Dominion and Provincial legislation, and undue interference with the policy of the Dominion.	21 May, 1918	704
11 Geo. V, 1921 (1st sess.), c. 49 (B.C.).	An Act to validate and confirm certain Orders in Council and Provisions relating to the Employment of Persons on Crown Property.	Act having been protested against by Consul General of Japan it was submitted to the Supreme Court to determine its validity. That Court found it *ultra vires*.	12 Oct., 1921 27 Mar., 1922	P.C. 4225 dated 12 Nov., 1921 P.C.743 & P.C.744, both dated 31 Mar., 1922.
11-12 Geo. V, 1921, c. 177 (N.S.).	An Act to Vest Certain Lands in Victoria County in Jane E. MacNeil.	The Minister was not aware of any circumstance, whether moral, equitable or legal in justification of legislation. The legislature in in passing the statute constituted itself a Court of Appeal from the Supreme Court of Canada.	17 Oct., 1922	P.C.2212 & P.C. 2213, both dated 21 Oct., 1922.
12 Geo. V, 1922, c. 14 (N.S.).	An Act to Amend Chapter 81, Revised Statutes, 1900, "Of the Use of Roads".	Disallowance requested by provincial government. This Act with c.40, 1922 was to change rule of road. By inadvertence the two Acts conflicted. Confusion that would have resulted was very dangerous to life and property of all Canadians using Nova Scotia roads.	31 July, 1922	P.C.1624 & P.C. 1625, both dated 5 Aug., 1922.

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
12 Geo. V, 1922, c. 40, (N.S.).	An Act to Amend Chapter 12, Acts of 1918, "The Motor Vehicle Act, 1918," and Acts in Amendment Thereof.	Disallowance requested by provincial government. This Act with c.14, 1922 was to change rule of road. By inadvertence the two Acts conflicted. Confusion that would have resulted was very dangerous to life and property of all Canadians using Nova Scotia roads.	31 July, 1922	P.C.1624 & P.C. 1625, both dated 5 Aug., 1922.
13 Geo. V, 1923, c. 32, (Alta.).	An Act to Impose a Tax upon Minerals.	Interference with Dominion interests and policies in that the legislation might operate to divest Dominion interests in lands and to give provincial authorities right of entry and distress upon such lands. These provisions are *ultra vires*. Also assumes to substitute province for tenant of Dominion lease.	2 Feb., 1924	P.C. 701 & P.C. 702 both dated 29 Apr., 1924.
1 Geo. VI, 1937 (2nd sess.), c. 1 (Alta.).	An Act to provide for the Regulation of the Credit of the Province of Alberta.	Act not merely *ultra vires* but constitutes an unmistakable invasion of the legislative field assigned to Parliament by the B.N.A. Act. It conflicts with Dominion laws and virtually supplants Dominion institutions designed by Parliament to facilitate the trade and commerce of the whole Dominion.	10 Aug., 1937	P.C. 1985 & P.C. 1986, both dated 17 Aug., 1937.
1 Geo. VI, 1937 (2nd sess.), c. 2 (Alta.).	An Act to provide for the Restriction of the Civil Rights of Certain Persons.	Act not merely *ultra vires* but constitutes an unmistakable invasion of the legislative field assigned to Parliament by the B.N.A. Act. It conflicts with Dominion laws and virtually supplants Dominion institutions designed by Parliament to facilitate the trade and commerce of the whole Dominion.	10 Aug., 1937	P.C. 1985 & P.C. 1986, both dated 17 Aug., 1937.
1 Geo. VI, 1937 (2nd sess.), c. 5 (Alta.).	An Act to amend the Judicature Act.	Act not merely *ultra vires* but constitutes an unmistakable invasion of the legislative field assigned to Parliament by the B.N.A. Act. It conflicts with Dominion laws and virtually supplants Dominion institu-	10 Aug., 1937	P.C. 1985 & P.C. 1986, both dated 17 Aug., 1937.

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
		tions designed by Parliament to facilitate the trade and commerce of the whole Dominion.		
2 Geo. VI, 1938 (1st sess.), c. 7 (Alta.).	An Act to Impose a Tax on Certain Securities in the Year 1938.	Act unjust in that it confiscates the property of one group for another and authorizes repudiation of debts regardless of ability to pay. It discriminates in that it seeks to relieve Albertans at the expense of Canadians generally. It would drive certain Dominion companies out of Alberta and deliberately injure the public and private credit of Canada. It is contrary to the clear intentions of the B.N.A. Act.	13 June, 1938	P.C. 1367 & P.C. 1368, both dated 15 June, 1938.
2 Geo. VI, 1938 (1st sess.), c. 28 (Alta.).	An Act to amend The Limitation of Actions Act, 1935.	The statute provides for wholesale repudiation of debts and creates such a state of uncertainty as to the debt situation in Alberta that Canadian lending companies are unable to report to the Superintendent of Insurance as required by law. It probably will affect the debts of farmers adjusted under the Dominion Farmers' Creditors Arrangement Act.	21 Mar., 1939	P.C. 676 & P.C. 677, both dated 25 Mar., 1939.
2 Geo. VI, 1938 (1st sess.), c. 29 (Alta.).	An Act for the Security of Home Owners.	Act unjust in that it confiscates the property of one group for another and authorizes repudiation of debts regardless of ability to pay. It discriminates in that it seeks to relieve Albertans at the expense of Canadians generally. It would drive certain Dominion companies out of Alberta and deliberately injure the public and private credit of Canada. It is contrary to the clear intentions of the B.N.A. Act.	13 June, 1938	P.C. 1367 & P.C. 1368, both dated 15 June, 1938.
3 Geo. VI; 1939, c. 80 (Alta.).	An Act to Amend The Limitation of Actions Act, 1935.	Act is substantially the same as c. 28, 1938 (1st sess.), previously disallowed.	28 Sept., 1939	P.C. 2949 & P.C. 2950, both dated 4 Oct., 1939.

TABLE OF DISALLOWED STATUTES 1867-1954—*Con.*

Citation	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Reference (*a*)
5 Geo. VI, 1941, c. 41 (Alta.).	An Act respecting the Suspension of Proceedings in Respect of Certain Kinds of Debts.	Act is part and parcel of the unconstitutional scheme of debt repudiation. It also enables the executive, contrary to constitutional principles, to deny access to the courts.	.....	P.C. 2350 & P.C. 2351, both dated 27 Mar., 1942.
5 Geo. VI, 1941, c. 47 (Alta.).	An Act to provide for the Orderly Payment of Mortgages and Agreements for the Sale of Land.	Act held *ultra vires* and infringed on valid Dominion legislation. It bars banks and other lending institutions from enforcing securities in the courts, including the bankruptcy court. It is a colourable attempt to regulate matters not provincial in their nature.	.....	P.C. 2350 & P.C. 2351, both dated 27 Mar., 1942.
5 Geo. VI, 1941, c. 62 (Alta.).	An Act to amend The Limitation of Actions Act.	Act is part and parcel of the scheme of debt repudiation and oppression of long term creditors.	.....	P.C. 2350 & P.C. 2351, both dated 27 Mar., 1942.
6 Geo. VI, 1942, c. 16 (Alta.).	An Act to prohibit the Sale of Lands to any Enemy Aliens and Hutterites for the Duration of the War.	Act invades the field covered by the Consolidated Regulations Respecting Trading with the Enemy (1939) and is repugnant to the Defence of Canada Regulations (Consolidation) 1942. The rights and obligations of enemy aliens should, in wartime, be dealt with exclusively by the Federal Government.	6 Apr., 1943	P.C. 2819 & P.C. 2820, both dated 7 Apr., 1943.

(*a*) A reference to a number before the asterisk (*) indicates the number of the page in Dom. & Prov. Legis. where the report upon the Act begins, and such a reference following the asterisk indicates the page in Prov. Legis. where the report begins.

Appendix B

TABLE OF RESERVED BILLS

1878-1954 (*a*)

Citation	Title	Reasons for Reservation	How dealt with	Reasons for Action	Date of Report of Minister of Justice	Reference (*b*)
31 Vict., 1867-68 (N.B.).	An Act relating to presentations to Parishes in city and county of St. John and county of Westmorland in the Province of New Brunswick.	.....	Assent not given....	Largely petitioned against by clergy and laity of the Church of England.	19 July, 1869	649
31 Vict., 1868 (N.S.).	An Act to amend chapter 16 of the Acts of 1865, entitled: "An Act in reference to the Militia".	.....	Assent not given....	Legislature had no right or authority to pass the Bill. Had it passed it would have been disallowed.	.....	471
31 Vict., 1868 (P.Q.).	An Act to incorporate the St. Louis Hydraulic Co.	The 2nd clause of the Act, which authorized construction of a dam, appeared to fall within powers of Parliament of Canada under para. 10, s. 91, B.N.A. Act.	Assent not given....	Apart from question of constitutionality of Act, it would not be safe in public interest to allow bill to become law because it would not only injuriously affect navigation but also cause great injury to property near banks.	11 Jan., 1869	250
32 Vict., 1869 (N.B.).	An Act relating to the appointment of Justices of the Peace in the several counties of this Province.	.....	Assent given.....	Bill within jurisdiction of legislature and unobjectionable.	14 Aug., 1869	650

32 Vict., 1869, c. 93 (N.B.).	An Act relating to Marriage Licenses.	Doubtful whether within jurisdiction of provincial legislature as trenching on subject of marriage and divorce, s. 91, para. 26, B.N.A. Act.	Assent given.....	Bill within jurisdiction of legislature.	26 Nov., 1869 11 Apr., 1870	655 658
32 Vict., 1869 (N.B.).	An Act in addition to, and in amendment of, c. 60, Title VIII, of the Revised Statutes "Of Harbours".	.....	Assent not given....	Beyond jurisdiction of legislature.	5 Apr., 1870	659
34 Vict., 1871 (N.B.).	An Act relating to the Synod of the Church of England in the Diocese of Fredericton and Province of New Brunswick.	1st section contained the clause "any rights of the Crown, notwithstanding".	Assent given.....	Within jurisdiction of legislature and no rights of Crown affected by it.	6 June, 1871	661
35 Vict., 1871, Bill No. 44 (Man.).	An Act to empower the Lieutenant-Governor to authorize the construction of Railways in this province.	Bill probably exceeded jurisdiction of legislature because railway joins to foreign country and it might thwart or impede any operations for construction of inter-oceanic railway under provisions of Dominion Act.	Assent not given....	Contrary to first principles of legislation as no provisions made for compensation for rights of property and other vested rights and for the same reasons as assigned for the reservation of the bill.	25 Nov., 1871	767 768 769
35 Vict., 1871, Bill No. 45 (Man.).	An Act to authorize the construction of a Telegraph Line in this province.	Bill exceeded jurisdiction conferred upon legislatures by B.N.A. Act because line joins foreign country.	Assent not given....	Act should be passed by Dominion Parliament and also for reasons given with respect to Bill No. 44.	14 July, 1871 25 Nov., 1871	767 768 769
35 Vict., 1871, Bill No. 46. (Man.).	An Act to incorporate the Western Railway of Manitoba.	Bill exceeded jurisdiction conferred upon legislatures by B.N.A. Act.	Assent not given....	Act might interfere with inter-oceanic railway to be built by Government of Dominion.	25 Nov., 1871	767 768 769
35 Vict., 1871, Bill No. 47. (Man.).	An Act to incorporate the Red River Bridge Co. of Manitoba and to authorize the construction of a Bridge across the Red River opposite or near Fort Garry and to levy tolls on said Bridge.	Proposed bridge would interfere with the navigation of river. Subject of navigation is in the sphere of Parliament.	Assent not given....	Interferes with navigation of river—a river navigable at certain seasons for a distance of 400 miles.	25 Nov., 1871	767 768 769

TABLE OF RESERVED BILLS 1878-1954—*Con.*

Citation	Title	Reasons for Reservation	How dealt with	Reasons for Action	Date of Report of Minister of Justice	Reference (*b*)
35 Vict., 1872 (Man.).	An Act to incorporate the Manitoba Central Railway Co.	Subject more appropriately within Parliament's jurisdiction. Also Act so badly drafted as to be useless.	Assent not given....	Same reasons as those assigned for reservation. Also might be against railway policy of Dominion.	24 Sept., 1872	771 772
35 Vict., 1872 (Man.).	An Act to incorporate the Assiniboine and Red River Navigation Company.	Trenches on ground reserved for Dominion Parliament respecting navigation and shipping.	Assent not given....	Act within competence of provincial legislature but objectionable, as 2nd clause provides that shareholders of company shall be, to all intents partners in same. This is contrary to first principles governing incorporation of companies and was presumed not to be intent of promoters.	24 Sept., 1872	771 772
35 Vict., 1872 (Man.).	An Act to constitute and incorporate the Law Society of Manitoba.	Apart from question of policy, bill is premature, and obstacles should not be placed in way of any person in good standing at bar of other provinces to practice law in Manitoba. Undesirable to restrict the selection of judges. Power to regulate fees is objectionable.	Assent not given....	For same reasons as those assigned for reservation.	24 Sept., 1872	771 772
35 Vict., 1872 (Man.).	An Act respecting Land Surveyors.	Objectionable on much the same grounds as Act respecting law society. Creates monopoly, which is unwise in present state of new and undeveloped country.	Assent not given....	There is great force in reasons for reservation, though these are for legislature to consider.	24 Sept., 1872	771 772
35 Vict., 1872 (B.C.).	An Act to amend the Qualification and Registration of Voters Act, 1871.	The 13th clause of the bill precluded exercise of electoral franchise by Chinese and Indians, in contravention of	Assent given.....	Imperial instructions to Governors of colonies are not applicable to Lieutenant-Governors. No instructions of such	18 Sept., 1872	1011

		instructions to Governors and of B.N.A. Act, s. 91(24).		nature in commission or instruction to Governor General since 1867. S. 91(24) of B.N.A. Act has reference to legislation connected with Indians generally and to lands reserved for them. S. 92 of B.N.A. Act confers on each province the right of legislating as to its franchise.		
35 Vict., 1872 (B.C.).	An Act to amend the Military and Naval Settlers' Act, 1863.	.....	Assent not given....	Operation of Act would conflict with 11th section of Terms of Union with Canada.	25 Sept., 1872	1013
35 Vict., 1872 (B.C.).	An Act to impose a Wild Land Tax.	Doubtful whether it may not be considered that it may apply to land hereafter to be appropriated for railway purposes under 11th section of Terms of Union with Canada.	Assent not given....	For same reasons as assigned for reservation.	8 Oct., 1872	1013
35 Vict., 1872 (B.C.).	An Act to render legitimate children born out of lawful wedlock, whose parents now are or may hereafter, be married.	.....	No action appears to have been taken.	.....	.....	1018 (see also J.L.A., p. 73)
35 Vict., 1872 (N.B.).	An Act to amend an Act intituled "An Act to continue an Act to regulate the sale of Spirituous Liquors".	.....	No action appears to have been taken.	.....	.....	J.L.A., p. 200
36 Vict., 1872-73, c. 43 (B.C.).	An Act to render legitimate children born out of lawful wedlock, whose parents now are or may hereafter, be married.	.....	No action appears to have been taken.	.....	.....	1018

TABLE OF RESERVED BILLS 1878-1954—*Con.*

Citation	Title	Reasons for Reservation	How dealt with	Reasons for Action	Date of Report of Minister of Justice	Reference (*b*)
36 Vict., 1873 (Ont.).	An Act to incorporate the Loyal Orange Association of Western Ontario.	.....	Assent not given....	Bill within the jurisdiction and competence of legislature as objects are provincial and should not have been reserved.	25 Aug., 1873	104
36 Vict., 1873 (Ont.).	An Act to incorporate the Loyal Orange Association of Eastern Ontario.	.....	Assent not given....	Bill within jurisdiction and competence of legislature as objects are provincial and should not have been reserved.	25 Aug., 1873	104
36 Vict., 1873 (Man.).	An Act respecting the Study and Practice of the Law.	Questionable whether province is sufficiently advanced and whether bar is of sufficiently stable and settled character to justify placing control and monopoly of bar in hands of practitioners resident in province.	No action appears to have been taken.	.....	.....	775
36 Vict., 1873 (Man.).	An Act to amend the Act 36th Vict., c. 20, for the prevention of Prairie Fires.	Certain clauses contrary to sound principles, and likely to prove injurious to interests of Dominion. They make surveyors, railway companies and contractors liable for result of fires caused by their men irrespective of facts whether there was negligence or whether men were under control of employers. Provision appears likely to interfere with survey of public lands.	Assent not given....	Act provides that surveyors, railway companies and contractors liable for result of fires caused by men, irrespective of whether there was negligence or whether men were under control of employer. Provisions appear likely to seriously interfere with survey of public lands.	21 Feb., 1874	775 777

36 Vict., 1873, c. 42 (Man.).	An Act to impose a Tax on Wild Land.	Similar Act passed in British Columbia was reserved.	Assent given.....	Act proposes annual tax on all lands of province, but exempts lands vested in Her Majesty, lands held for benefit of Indians, lands entered as homesteads, lands held by Canadian Pacific railway and lands set apart for half-breed minors.	21 Feb., 1874	775 777
36 Vict., 1873, c. 43 (Man.).	An Act respecting Aliens.	Doubts entertained as to power of provincial legislature to deal with subject.	Assent given.....	Legislation respecting property and civil rights under control of provincial legislature and, as bill deals with holding of property by aliens, is within the powers of the legislature.	21 Feb., 1874	775 777
36 Vict., 1873, c. 44 (Man.).	The Half-Breed Land Grant Protection Act.	Act is retroactive, dealing with existing contracts and cancelling them, opens fruitful door for litigation; no machinery provided for carrying out sale of lands on which lien is established.	Assent given.....	Act beneficial in protecting interests of persons entitled to share in half-breed land grant having regard to circumstances under which appropriation of Dominion lands was made for half-breeds.	21 Feb., 1874	775 777
36 Vict., 1873, c. 45 (Man.).	An Act to incorporate the Eastern Railway Company of Manitoba.	Bill may possibly interfere with line of Pacific Railway. Objectionable clause in bill making shareholders partners, though limiting liability to amount of shares.	Assent given.....	Act considered unobjectionable.	25 Feb., 1874	775 779
37 Vict., 1874 (N.S.).	An Act to facilitate arrangement between Railway Companies and their Creditors.	Seems to encroach on domain of Parliament as touching on questions of bankruptcy and insolvency.	Assent given.....	Comes within competence of Legislature. As to petition against it, a bill of this kind always involves some injury to vested rights. This is a question for the majority of stockholders.	8 Dec., 1874	482 484
37 Vict., 1874, c. 61 (N.B.).	An Act to further continue and amend the Act to incorporate the Meduxnikik Boom Co.	Reserved in consequence of protest alleging that it would deprive American citizens of the rights secured to them by the Ashburton Treaty.	Assent given.....	Bill as originally submitted had been materially changed and several conditions added qualified to secure free navigation of river to all lumber manufacturers and protest withdrawn.	27 May, 1874	706 707

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TABLE OF RESERVED BILLS 1878-1954—*Con.*

Citation	Title	Reasons for Reservation	How dealt with	Reasons for Action	Date of Report of Minister of Justice	Reference (*b*)
37 Vict., 1874 (P.E.I.).	The Land Purchase Act, 1874.	Affects private rights by endorsing compulsory sale by proprietors of 500 acres or upwards, at prices to be determined under system of arbitration.	Assent not given....	Act objectionable as it does not provide for impartial arbitration in which proprietors would have a representation.	23 Dec., 1874	1154
38 Vict., 1875 (P.E.I.).	The Land Purchase Act, 1874.	.....	Assent given.....	Objections to bill in previous session were removed and bill is one coming within the competence of a provincial legislature.	26 May, 1875	1161
38 Vict., 1875 (Man.).	An Act respecting Land Surveyors and the Survey of Lands in the Province of Manitoba.	Bill deemed objectionable for following reasons: Bulk of lands in province, being yet Crown lands, belonging to the Dominion, the bill prohibits any one from acting as surveyor unless possessing proper qualifications. Deals with whole question of mode of surveying lands in province. Creates conflict of authority, as Dominion Lands Act provides who shall act as surveyors of Dominion lands and mode of survey of Dominion lands; also provides for board of examiners for admission of deputy surveyors, as does present Dominion Act. Provisions of bill are illiberal and unjust, and would create a monopoly.	Assent not given....	Referred to reasons assigned for reservation and also to reasons mentioned in report on bill "An Act respecting Land Surveyors" of 1872.	29 Jan., 1876	794 795

39 Vict., 1876 (P.E.I.).	An Act to amend the Land Purchase Act, 1875.	.....	Assent not given....	Bill is retrospective in its effects; it deals with rights of parties now in litigation under the Act which it is proposed to amend. Absence of any provision saving the rights and proceedings of persons whose properties have been dealt with under the Act of 1875.	18 July, 1876	1163 1176
39 Vict., 1876 (P.E.I.).	An Act to vest a certain portion of Government House Farm, in the city of Charlottetown, for certain purposes therein mentioned.	No reasons assigned but a similar Act on the same subject had been disallowed by the British authorities.	Assent given.....	Bill properly reserved because former bill disallowed, but no injury will result to the Government House grounds by alienation of the land and the present Lieutenant-Governor sees no objection to bill being passed.	2 Dec., 1876	1179 1182
39 Vict., 1876 (Man.).	An Act to incorporate the Manitoba Investment Association Limited.	Powers conferred on the association were beyond competence of provincial legislature, as Dominion parliament has exclusive authority in respect to "banking and interest". Bill appeared to authorize association to carry on some of the branches of business usually regarded as banking.	Assent not given....	Question raised is one of great difficulty. Inconveniences might arise if Governor in Council called upon to give vitality to provincial legislation of this description, though had bill been assented to it would not have been disallowed.	4 Oct., 1876	814
40 Vict., 1877, No. 35 (B.C.).	An Act to amend the Gold Mining Amendment Act, 1872.	Bill gives jurisdiction in all personal actions to Gold Commissioners in Kootenay and Cassiar, and appears to trench on 36th sec. of B.N.A. Act, which vests appointment of Supreme and County Court Judges in Governor General alone, and provincial legislature does not have power to make the appointments mentioned in the Act.	Assent not given....	Jurisdiction of mining court in districts referred to will be greater than that of County Court, and equal to that of Supreme Court. If assented to it would be necessary for a Supreme Court Judge to proceed to district named to try criminal cases.	29 Sept., 1877	1045
41 Vict., 1878 (P.Q.).	An Act respecting the *Quebec, Montreal, Ottawa* and Occidental Railway.	.....	No action appears to have been taken.	.....	.....	J.L.A. 1877-8, p. 230.

TABLE OF RESERVED BILLS 1878-1954—*Con.*

Citation	Title	Reasons for Reservation	How dealt with	Reasons for Action	Date of Report of Minister of Justice	Reference (*b*)
41 Vict., 1878 (P.E.I.).	An Act to repeal certain Acts relating to the Church of England in this province, and to make provisions in lieu thereof.	Among Acts repealed by this Act is permanent one declaring the liturgy of the church established by laws of England in Prince Edward Island shall be deemed fixed form of worship in Island. Act therefore disestablishes Church of England and interferes with prerogative of the Sovereign as the temporal head of the church. Act has no suspending clause.	Assent given. (*c*)....	Bill within legislative authority of the provincial legislature, and is one in which no Dominion or Imperial interests are involved.	14 Apr., 1879	1200
41 Vict., 1878 (P.E.I.).	An Act to incorporate the Provincial Grand Orange Lodge of Prince Edward Island, and the subordinate Lodges in connection therewith.	.....	Assent not given....	Bill within competence of legislature and as objects are provincial should not have been reserved.	14 June, 1879	1202
42 Vict., 1879 (N.S.).	An Act to incorporate the Nova Scotia District Branch of the Independent Order of Oddfellows.	14th section trenches on jurisdiction of Parliament as it not only attempts to deal with crimes but undertakes to repeal part of criminal statutes passed by Parliament.	Assent not given....	Provisions of Bill clearly beyond powers of legislature. Objectionable provisions, if allowed to stand, might cause inconvenience and embarrassment.	16 June, 1879	504
43 Vict., 1879 (Man.).	An Act respecting Public Printing.	.....	No action appears to have been taken.	.....	.....	J.L.A., p. 83.
44 Vict., 1881 (P.E.I.).	An Act relating to Factories in Incorporated Cities.	.....	No action appears to have been taken.	.....	.....	J.L.A., p. 287.

44 Vict., 1882 (Man.).	An Act to incorporate the Loyal Orange Lodge Association of Manitoba.	.....	No action appears to have been taken.	.....	.....	J.L.A., p. 74.
52 Vict., 1889, No. 94 (N.B.).	An Act to prevent the advertising of Foreign Lotteries in this Province.	.....	No action appears to have been taken.	.....	.....	J.L.A., p. 170
53 Vict., 1890 (P.Q.).	An Act to legalize the marriage and contract of marriage of Aimé Bourassa and Dame Purissima Robert.	Infringes on the legislative powers exclusively assigned to the Dominion Parliament by B.N.A. Act, s. 91(26) "marriage and divorce".	No action appears to have been taken.	.....	.....	436
54 Vict., 1890 (P.Q.)	An Act to render the the marriage contracted between Frederick Pratt and Marie-Albina Thibault civilly valid.	Infringes on the legislative powers exclusively assigned to the Dominion Parliament by B.N.A. Act, s. 91(26) "marriage and divorce". Also on ground that marriage contracted in United States.	No action appears to to have taken.	.....	.....	438
53 Vict., 1890, c. 56 (Man.).	An Act respecting Sales of Lands for Taxes.	Comparison of bill with clause of c. 45 of 52 Vict. to which exception was taken in report of Minister of Justice shows them to be virtually the same. Lieutenant-Governor considered himself bound by considerations which induced disallowance of c. 45 of 52 Vict. If bill becomes law it might lead to confusion in municipal accounts and injustice to individuals.	Assent not given....	Bill might have been dealt with in usual manner without having been reserved for Governor General's assent. If assented to, it would have had to be disallowed, as it was re-enactment of provisions which had already been disallowed.	18 Mar., 1891	915 927
53 Vict., 1890, c. 57 (Man.).	An Act affecting arrears of Taxes in the City of Winnipeg.	Comparison of bill with clause of c. 45 of 52 Vict. to which exception was taken in report of Minister of Justice shows them to be virtually the same. Lieutenant-Governor	Assent not given....	Bill might have been dealt with in usual manner without having been reserved for Governor General's assent.	18 Mar., 1891	915 927

TABLE OF RESERVED BILLS 1878-1954—*Con.*

Citation	Title	Reasons for Reservation	How dealt with	Reasons for Action	Date of Report of Minister of Justice	Reference (*b*)
		considered himself bound by considerations which induced disallowance of c. 45 of 52 Vict. If bill becomes law it might lead to confusion in municipal accounts and injustice to individuals.				
54 Vict., 1891, c. 8 (Man.).	An Act to authorize companies, institutions or corporations, incorporated out of this Province, to transact business therein.	Virtually a re-enactment of the Act c. 23, 53 Vict. previously disallowed. Though assent might have been given in accordance with policy stated by Governor General and left to be dealt with as an Act by Governor General, yet having regard to peculiar conditions in the province at the time assent reserved.	No action appears to have been taken.	.....	.....	989
55 Vict., 1892 (P.E.I.).	An Act respecting the Legislature of Prince Edward Island.	.....	Assent not given.....	Objects of bill are to abolish legislative council, to provide for legislature consisting of one house only, and to change to some extent the representation and amend laws relating to election for legislature. These are matters within competence of legislature and reason given by Lieutenant-Governor is not sufficient to warrant Governor General in accepting responsibility respecting measure. Bill should not have been reserved.	26 Jan., 1893	1222 1225

55-56 Vict., 1892 (P.Q.).	An Act to legalize the marriage of Henri Aime Bourassa and Dame Purissima Robert.	This Act is the same as one reserved in 1890. Further, the object of the Bill is to give the child of these two a share of the estate of an uncle. It is thus in the nature of *post facto* legislation and unjust.	Assent not given....	Should Act be passed as a statute, the Minister of Justice would have opportunity of considering questions involved, but at present advises no action thereon.	16 Feb., 1893	456 458
55-56 Vict., 1892 (P.Q.).	An Act to incorporate La Banque Hypothécaire Canadienne.	Dominion parliament alone has power to legislate on banking and the incorporation of banks. Name apt to create confusion.	Assent not given....	Should Act be passed as a statute, the Minister of Justice would have opportunity of considering questions involved, but at present advises no action thereon.	16 Feb., 1893	456 458
55 Vict., 1892 (N.B.).	An Act to declare the rights of the Crown as represented by the Government of the Province in certain lands and property.	Some doubt as to validity....	Assent not given....	Unable to agree with view of law and facts on which the bill seems to have been passed. Should be dealt with by Parliament.	26 Jan., 1893	756 757
57 Vict., 1894 (N.B.).	An Act to amend an Act respecting the use of Tobacco by Minors.	Doubt whether this bill is not attempting to make sale of tobacco to minors a crime, and if so, if within power of legislature.	Assent not given....	Doubtful if the bill falls within legislative authority of the province. Inconveniences might arise if Governor General assented to legislation of this kind, and usual course with respect to similar legislation should be followed, though it would not be disallowed if passed.	14 Mar., 1895	761 762
57 Vict., 1894 (P.E.I.).	An Act to amend an Act passed in the twelfth year of Her present Majesty's reign, intituled "An Act to prevent peddlars travelling and selling within this Island without licence", and the Acts in amendment thereof.	.....	No action appears to have been taken.	.....	.....	J.L.A., p. 288.

TABLE OF RESERVED BILLS 1878-1954—*Con.*

Citation	Title	Reasons for Reservation	How dealt with	Reasons for Action	Date of Report of Minister of Justice	Reference (*b*)
60 Vict., 1897, No. 40 (B.C.).	An Act relating to the employment of Chinese or Japanese persons on works carried on under franchises granted by private Acts.	Provisions exceptional and doubtful whether within competence of legislature. Might interfere with international relations and Federal interests.	Assent not given....	Doubtful validity and may interfere with international relations and Federal interests.	15 Oct., 1897 22 Dec., 1897	531* 535
62 Vict., 1899, No. 65 (N.B.).	An Act to provide for Licensing of certain non-residents engaging in employment of labor in the Parishes of the City and County of Saint John.	.....	No action appears to have been taken.	.....	.....	J.L.A.. p. 185.
4 Edw. VII, 1904, No. 146 (P.Q.).	An Act to amend Article 599 of the Code of Civil Procedure.	The amendment might be construed as rendering liable for seizure the salaries of public officers appointed by the Federal Government and might be considered as infringing on legislative power of Parliament.	Assent not given....	The reasons for reservation are such as to demonstrate that bill should not be given effect to by the Governor General.	29 Oct., 1904	227
4 Edw. VII, 1904, No. 72 (B.C.).	An Act to amend the "Municipal Elections Act".	.....	No action appears to have been taken.	.....	.....	J.L.A. 1903-4, p. 116
4 Edw. VII, 1904, No. 23 (P.E.I.).	An Act respecting North River Road and Victoria Park.	.....	No action appears to have been taken.	.....	.....	J.L.A., p. 106.
7 Edw. VII, 1907, c. 21A (B.C.).	An Act to regulate Immigration into British Columbia.	.....	Assent not given....	The bill even if assented to could have no effect. It purports to make immigration of certain classes of people lawful and this is lawful independently of the bill.	27 Nov., 1907	690

5 Geo. V, 1915, c. 50 (B.C.).	An Act to amend the "Pool-rooms Act."	Provisions of Bill appear to affect the standing of aliens in the province and if so might seriously interfere with international relations and Federal interest.	Assent not given....	Whatever effect bill might have as to aliens or international relations, the Minister of Justice was not prepared to recommend assent.	25 Jan., 1916	698
9 Geo. V., 1919 (B.C.).	An Act to amend the Vancouver Island Settlers' Rights Act, 1904.	Lieutenant-Governor had been instructed to reserve such bills.	Assent not given....	It is simply a re-enactment of a statute previously disallowed.	26 Jan., 1916	759
10 Geo. V, 1920, c. 97, (B.C.).	An Act to amend the Vancouver Island Settlers' Rights Act, 1904.	Lieutenant-Governor had been instructed to reserve such bills.	Assent not given....	It is simply a re-enactment of the reserved bill passed the previous year and not assented to.	29 Mar., 1921	759
1 Geo. VI, 1937, No. 1 (3rd sess.) (Alta.).	An Act respecting the Taxation of Banks.	.....	No action appears to have been taken.	.....	.....	Statutes of Alberta, 1937-8, 1937 (3rd sess.) p. 31.
1 Geo. VI, 1937, No. 8 (3rd sess.) (Alta.).	An Act to amend and consolidate The Credit of Alberta Regulation Act.	.....	No action appears to have been taken.	.....	.....	Statutes of Alberta, 1937-8, 1937 (3rd sess.) p. 33.
1 Geo. VI, 1937, No. 19 (3rd sess.) (Alta.).	An Act to ensure the Publication of Accurate News and Information.	.....	No action appears to have been taken.	.....	.....	Statutes of Alberta, 1937-8, 1937 (3rd sess.) p. 37.

(*a*) This Table may not be complete. Three entries in the Table in Dom. and Prov. Legis. are not found herein: Two are "The Ontario Factories Act, 1884" and an Act in amendment of "The Half-Breed Land Grant Protection Act" of Manitoba of 1877, which were not reserved; the other is an Act to vest a certain portion of Government House farm in the City of Charlottetown which was reserved in 1873 for the pleasure of the Queen, and not of the Governor General.

(*b*) A reference to a number without more before the asterisk(*) indicates the number of the page in Dom. & Prov. Legis. where the report of the Lieutenant-Governor or the Minister of Justice upon the bill begins or the page where it is otherwise referred to; such a reference following the asterisk indicates the equivalent page in Prov. Legis.; J.L.A. means the journal of the legislative assembly for the province and year concerned.

(*c*) While assent was formally given, communication was not had with the Province in time for the bill to be proclaimed in accordance with section 57 of the B.N.A. Act: see Dom. & Prov. Legis., pp. 1200-1202.

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